APPENDIX
VOLUME IV

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 77-1163

E. RICHARD FRIEDMAN, O.D., et al.,
Appellants

VS.

N. J. ROGERS, O.D., et al.,
Appellees

No. 77-1164

N. J. ROGERS, O.D., et al.,
Appellants

VS.

E. RICHARD FRIEDMAN, OD., et al.,
Appellees

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., et al.,
Appellants

VS.

N. J. ROGERS, O.D., et al.,
Appellees

Appeals From The United States District Court For the Eastern District of Texas

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No. 77-1163 Filed February 16, 1978
No. 77-1164 Filed February 16, 1978
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

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Appeals from the United States
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[In the United States District Court
for the Eastern District of Texas]

DEPOSITION OF DEAN CHESTER PHIEFFER

[44]

Q. And it is your testimony that the practices of optometry and law are alike because the lawyer is selling paper clips and the optometrist is dispensing spectacles?

A. Because they both claim to be a profession.

Q. Is there any other likeness that would justify this comparison other than the paper clip dispensed by the lawyer?

A. Oh, I would think less in the law as there is in medicine and dentistry, of course, in that medicine and dentistry are primarily concerned, as are optometry, with health care. I am not sure that lawyers consider themselves to be primarily concerned with health care.

Q. Well, you made the comparison of trying to compare optometry with law or medicine.

A. No. I said the profession as a professionalism says that the advertising or solicitation of patients is not professionalism as said by lawyers. Therefore, if they say what professionalism is, you are asking me what is professionalism, I say we have that kind of commonality.

Q. You would agree in optometry, as has been true from the outset, there is a direct product associated with the profession of optometry.

A. Not always, but a great deal of the time, yes.

Q. Largely so, is there not?

A. A fair larger part of the time, and not always in children. It is particularly not so.

Q. And that associated with that product from optometries inception in the 1920's.

A. I am sorry. Say that again.

Q. Associated with that product since the inception of optometry, whenever it was, has been advertising of that commodity or product.

A. No. Optometry began around 1890 when the apprentice and some ophthalmologists got into the furor. The furor was over the fact the apprentice was charging three dollars for an examination fee and putting the emphasis upon the examining and upon services and not upon materials. And optometry has been since that time trying to move into the professional sphere. Now, there has been a great deal of problem in it so doing, but that has been its goal.

* * *

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Q. Well then, I construe your answer to be that your concern is not to provide these services at the lowest possible cost.

A. I don't know quite how one would do what you are saying in terms of each individual considering his own value. Your emphasis is upon material as I feel my emphasis is upon services.

Q. I am referring to the entire package, both of services and materials, because that is the end result.

A. I beg to differ with you. The end result as far as the optometrist is concerned should be that prescription which he writes.

Q. Well, do you agree with me that most optometrists in Texas dispense their own --

A. Yes.

Q. And derive some economic benefit from that dispensing?

A. Yes.

Q. Whether it is in the form of a service fee or a product charge?

A. Yes.

Q. And so in the end the patient is getting a bundle and that bundle is mixed with service and product, is it not?

A. Yes, but that doctor may -- and I guess again we have got a wide variety of approaches to that problem, that we would hope that doctor would charge for his services according to how he values himself, or what he considers his worth, and that he will provide his materials essentially at cost, which is what we try to teach our students, so that the emphasis is not upon that material cost.

Q. But upon the professional worth of the service?

A. Right.

Q. And the doctor establishes in your mind that worth.

A. Well, I am sure you do the same. Every professional person does that same.

* * *

[90]

Q. Well, of the 900 or so optometrists practicing in Texas, you cannot name five percent who do not dispense their own materials?

A. How many is five percent? Forty?

Q. Forty-five.

A. That may be. I don't know. I have not been around the state to find out, but I would say in the next five years you would find more and more of them.

Q. The reason they do dispense, it is necessary for the economics of their --

A. I challenge that statement.

Q. You do not agree?

A. I do not agree.

Q. What facts do you have to show that it is not --

A. There are men in the state now who are practicing without dispensing, and more and more of them are doing so each year.

Q. Can you give me the names of as many as ten?

A. Yes, Dr. -- ten? No, I can't.

* * *

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Q. But the optometrist himself as an optician realizes a gain from the dispensing of the product because of the fitting fee that is attached.

A. He has a technical service fee, yes. He moves over to a technical or technician level at that time.

* * *

[In the United States District Court
for the Eastern District of Texas]

DEPOSITION OF DR. NELSON WALDMAN

[7]

Q. Were you active in the legislative fight for the passage of the 1969 Optometric Act?

A. Yes, sir.

Q. Were the statements and reasoning that you have just summarized conveyed to members of the House and Senate?

A. Yes.

Q. During the 1969 session?

A. Yes, they certainly were.

Q. By whom?

A. By many members of the Texas Optometric Association.

Q. Generally speaking, do the members of the TOA act as their own lobbyists?

A. Yes, they do.

Q. As chairman of the Board of TOA at that time, were you personally aware that the optometrists from the State were communicating this information to the members of the Legislature?

A. Yes, I was.

Q. Did your association actively support the passage of the bill as it finally passed?

A. Yes, we did.

* * *

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Q. In your opinion does membership in TOA render, generally speaking, a doctor more likely to emphasize quality eye care rather than volume or price?

A. Yes.

Q. Does membership in TOA in your opinion result in a doctor being more free from controlled and outside pressures?

A. Yes.

Q. Thus more likely to enforce the provisions of Section 5.09 and 5.10?

A. Repeat that, please.

(Whereupon the last question was read by the Court Reporter.)

A. Yes, I would say so.

MR. NIEMANN: I have no further questions.

MS. PRENGLER: I just have two or three.

EXAMINATION BY MS. PRENGLER:

Q. Dr. Waldman, earlier you testified that you knew of many instances where optometrists had contacted members of the Legislature and talked to them about problems, for example, problems with price advertising before the passage of the Statute in 1969. Do you remember the names of any of the specific legislators? Can you give us an idea how

prevalent this was, whether it was isolated instances?

A. No, it wasn't isolated at all. As as a matter of fact, I would say that members of the Texas Optometric Association talked to probably every single one of the legislators at that time, even the ones that they knew were probably going to be opposed.

Q. During the time that you were chairman of the Texas Optometry Board, how many members were on the Board who were not members of the Texas Optometric Association?

A. Two.

* * *

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Q. Do you have any statistics upon which you can base such an answer?

A. I don't know that I have statistics; I have impressions.

Q. You said that a young optometrist graduating from school could either join a club or he could join a church or send out announcements or take other steps so as to "get known." What other steps would he normally take to become known so that he can attract patients?

A. Well, he might play golf or he might join a bowling league. There are any number of things of this nature that he might do.

Q. Do those activities promote quality practice of optometry?

A. No, they certainly don't.

Q. Joining the Optomists Club is not going to do anything to advance the cause of the profession of optometry, is it?

A. I don't think that was your question. I thought your question had to do with starting a practice.

Q. My question is, if a young man has got to spend his time working in the community and joining clubs, playing golf, that's not advancing the professional practice of optometry, is it?

A. No, that's true, because you must realize, Mr. Keith, that at that point in a person's career he has a great deal of time.

Q. The reason he has a great deal of time is that he doesn't have very many patients?

A. Right. He is not very well known at that point.

Q. You don't tell me that the optometrist is better off because he is going to the Optomists Club meeting rather than serve a patient whose visual needs --

A. I don't think I said that. Did I say that?

Q. That's certainly the implication. If he has got to go to the Optomist Club, he can't sit there and tend to his patients, can he?

A. I don't think that I said that, did I? I would like to have that -- would you repeat that for me.

Q. I don't recall your saying it. That's a direct implication of what you said.

A. I don't think it's an implication of any kind. Would you please tell me how you arrive at that implication?

Q. I will ask the questions and you will answer them. If you don't want to answer them, just say so, the Court can take that up. Just tell me how joining the Optomists Club can foster or improve the professional practice of optometry.

A. Mr. Keith, I didn't say that. What I said to you, I believe, was that a young man getting started in practice, in order to have a practice, in order to have patients, must make himself known. People are not going to come to him if they don't know him. Joining the Optomists Club or joining any other club is a means of getting himself known.

Q. Whereas, if were allowed to advertise, that would also be a means of communicating to the public the fact of his presence, his so-called skill?

A. It most certainly would.

Q. And that would be a means of becoming better known?

A. Yes, it would.

Q. Yet that means, would it not, Dr. Waldman, would challenge the status quo of the practitioners already located and well known in the community?

A. I am not sure I understand your question.

Q. Well, you are hypothetically an optometrist in a community.

A. Right.

Q. And are well established and thus, "well known."

A. All right.

Q. A young qualified and competent man comes to town. He is not well known. The moment that he commences to advertise and attract patients, then he is challenging your established position in that community, is he not?

A. I don't consider it that at all.

Q. You said that if the optometrist advertises, that this results in an increased cost to him. That's true, is it not?

A. I would think so.

Q. Whatever money he spends on advertising would be an increase in cost?

A. I would think so.

Q. And that he must compensate for this either by increasing his charge to the patient or by seeing more patients so as to make up for that additional cost, is that correct?

A. I would think so.

Q. That's what you testified to?

A. Yes, sir.

Q. Now, a third event could occur, could it not, and that is, he could reduce his margin of profit?

A. I suppose that's a possibility.

Q. And that would not result in any increased cost to the patient, nor would it result in any increased pressure on him to conduct this volume type practice?

A. I don't agree with that, Mr. Keith, because I think that if a man were put in this position where he were

forced by his overhead, by his advertising cost to reduce his "margin of profit," the net income -- whatever you want to call it. If he were forced by these pressures, then he would necessarily have to see a great deal more people in order to make the same living, and by virtue of the fact that he had to see so many more people, he couldn't possibly give as much time to those that he sees.

Q. Well, implicit in your statement, is it not, is the proposition that he is entitled to this certain static amount of living, and he's going to get that either by seeing more people or charging more money.

A. Well --

Q. When in fact he can reduce that net earnings and not have to do either one.

A. Human nature is very peculiar, Mr. Keith. In my experience people don't like to reduce their standard of living.

Q. Where do you professional men get the idea that you have a right to a fixed income?

A. I didn't say anything about professional people or fixed income. I said that people don't like to reduce their standard of living regardless of who they are, whether it's the ditch digger or the president of the United States. In my experience people don't like to reduce their standard of living, and they always aspire to a greater standard of living rather than a lesser one.

Q. Are you suggesting to the Court that there is vice inherent in seeing a large number of people?

A. No, sir.

Q. Are you suggesting to the Court that every cost factor in an optometric practice that increases should be passed on to the patient or else compensated by increased volume?

A. Say that again, would you?

Q. If the price of rent goes up or the price of frames goes up or the price of laboratory work goes up, is that an item that you necessarily feel should be passed on to the patient?

A. I think eventually this is true in most anything in our economy today.

Q. Do you have a ground floor location in downtown Houston?

A. Yes, I do.

Q. On Main Street?

A. No.

Q. On Fannin?

A. Yes.

Q. Is your rent substantially greater than it might be if you were up on one of the upper floors of a building?

A. Possibly.

Q. Does that result in an increased cost to your patient as compared to the cost that the patient would experience in an upper floor office building?

A. I suppose that could be a factor.

Q. What about the volume; does that affect the volume of your practice in that you are accessible to and visible to the patients?

A. I don't know that it affects volume because there are only so many hours in the day.

Q. Why did you choose that location and why do you remain there if it does not influence your volume?

A. We are considering not remaining there. We are considering getting into a building some time soon.

Q. How long have you been there?

A. We have been in this location since 1962.

Q. Now, are there a number of practical methods that can be employed to deliver eye care to members of the public without necessarily increasing the cost, such as more efficient operations, greater use of para-professionals, the deployment of personnel in a more effective way?

A. Yes. There are some people who do this very thing and very effectively.

Q. Normally those people would not as professional optometrists dispense their own spectacles, would they?

A. There are many who do not.

Q. And many who believe that by not dispensing, they can deliver quality eye care to a larger number of people at a lower cost?

A. That's what they believe, I am sure.

Q. And such economies as that exist in a variety of forms to a greater or lesser degree, is that correct?

A. I would think so.

Q. Would you tell me what precise steps the TOA has taken at any time you held any office to increase the

number of persons who could be served and reduce the cost of that service insofar as it relates to eye care in Texas?

A. Of course, the Texas Optometric Association has been very active through the years in providing that more people are served simply by virtue of the fact that the Texas Optometric Association is responsible for the establishment and, of course, the support both financially, physically, morally and many other ways of the College of Optometry at the University of Houston.

Q. Did you know that Dr. Rogers was also a substantial contributor to that effort?

A. I know that Dr. Rogers was a contributor, yes.

Q. Now, what else has the TOA done besides support the formation and continued operation of the college?

A. Of course, the College of Optometry creates many many more optometrists in this State than we normally might otherwise have, and if we have these more optometrists, then we are providing for more people to be given service.

Q. What have you done to reduce the cost to the consumer or patient?

A. I don't know that there was any specific cost-cutting idea involved.

Q. You have dealt with these younger men who have consulted you as they try to enter into a practice, young men coming out of school that consult with you about the ways and means of establishing a practice.

A. I have had that happen frequently, yes.

Q. And you have been a member of the various societies from time to time within your profession?

A. Not from time to time. I have been and am a member of the societies and associations, yes.

Q. Would you tell the Court what position you take and that your organizations take with respect to suggested fees for various services performed?

A. Well, the position of the Texas Optometric Association has been that fees should be charged for services, and materials de-emphasized, the cost of materials de-emphasized to the extent that many of the practitioners charge on the basis of a fee for service and materials at cost.

Q. What do you say to the younger men in the profession with respect to the fee that should be charged for a normal eye examination?

A. I have never advised anyone what to charge.

Q. Are there any recommended or suggested fees for services promulgated by your society?

A. No.

Q. Have these been discussed?

A. No.

Q. Not at all?

A. Not in dollars, no.

Q. There is no and has been no recommended or minimum fee?

A. No, not to my knowledge ever.

Q. That's all I can ask --

A. Yes.

Q. -- is what you have experienced. What is your customary fee for an eye examination?

A. My basic fee is twenty-five dollars.

Q. Do you do contact lens dispensing?

A. Yes.

Q. What is your charge for the customary contact lens examination and dispensing?

A. The customary fee is two hundred dollars, and that's an all-inclusive fee.

Q. For hard contacts?

A. Yes.

Q. What with respect to soft contacts?

A. The usual fee is three hundred dollars.

* * *

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Q. What about the lens to be manufactured to that normal prescription?

A. I am not sure what the cost would be. I would think probably something like this would be somewhere in the neighborhood of ten dollars.

Q. So the difference -- let's suppose that the lens cost was ten dollars and the frame cost was eight.

A. Okay.

Q. That's a total charge of eighteen dollars to you, whereas the service attached to that commodity would be a total of forty-five dollars, would it not?

A. Well, Mr. Keith, I consider it all service. You see, it's analogous in my thinking to a broken leg. If you break your leg and you go to your orthopedist, he is going to put a cast on your leg. Now, he is going to charge you X number of dollars for the service that you receive. He is not going to break it down into so much for the cast and so much for the service. He is going to charge you X number of dollars for the service, and he is going to provide the cast. Now, as far as I am concerned, this is the very same thing.

Q. Doctor, if I was examined and those lens frames were provided to me --

A. I think you can have them back. As a matter of fact, you may need them.

Q. Thank you. I don't recall the charge, but my memory is that it was forty-seven dollars. Then that's quite a difference to the seventy dollar charge that you have indicated would be your fee.

A. You didn't come to me, Mr. Keith.

Q. That's right. I went to Dr. Fahey on Orleans Street in Beaumont. What explanation or justification is there for the difference in the seventy dollar charge that you would make and the forty-seven dollar charge that Dr. Fahey of TSO makes?

A. I don't have any idea about Dr. Fahey, and I can't answer for him. I don't know him.

MS. PRENGLER: Are you basing or assuming it was a forty-seven dollar charge? You are not testifying at this time?

MR. KEITH: I believe it was. I know it wasn't any more than that.

MS. PRENGLER: But you are not under oath.

MR. KEITH: I understand.

Assume that that was true, that it was forty-seven dollars, and I believe that it was, but I could be mistaken. Is there any fact or factor that would render your service thirty or forty percent more valuable?

A. I don't know. Perhaps the doctor you are referring to, who I don't know, doesn't consider that his services are worth any more than what he is charging.

Q. My question is, from the standpoint of the patient, is there more value derived from you service than --

A. All I can tell you is this, Mr. Keith. I charge in my office what I consider to be a fair fee for the service provided, and I think it's pretty obvious that the people who come to me consider that we are charging fair fees because we have been relatively successful.

Q. You would preserve also the right of Dr. Fahey to charge a fair fee?

A. Of course.

Q. Whatever that may be?

A. That's his business.

Q. But, now, from the standpoint of the patient is there more value that he derives from the seventy dollar charge than from the forty-seven dollar charge?

A. I can't answer that, Mr. Keith. I don't know anything about the forty-seven dollar charge and what it includes.

Q. Well, it included a complete eye examination and the dispensing of these glasses that I have worn a year or two.

A. Yes, that's in your opinion, and I don't know of my own opinion. I can't have an opinion if I haven't been examined. If you would like to send me to Dr. Fahey to be examined and have him prescribe glasses for me, perhaps I can answer that question for you.

Q. Doctor, let's suppose that I went to Dr. Fahey because I couldn't see or was having difficulty seeing. He prescribed these glasses, and I played tennis in them and flown in airplanes in them and done everything that a man does, inside and out, in these glasses, with perfect comfort and excellent visual results. As a layman I don't know of anything else he could have provided. I have no physical or health defects. I have been to my internist, so I have got no blood pressure or diabetes or glaucoma, iritis or anything else. What else could any competent optometrist have done other than provide me a set of glasses that allows me to see perfectly?

A. Are you in a position to enumerate for me all the services that this doctor, whatever his name is, rendered? I can't answer that because I don't know what he did.

Q. Well, he made a complete eye examination and prescribed a set of glasses.

A. What do you call --

MS. PRENGLER: I am going to have to object to your continued testimony.

THE WITNESS: You will have to describe to me what you call a complete eye examination.

Q. Well, he didn't give me any blood pressure test.

A. Let me stop you for a moment, if I may. I am not trying to give you a bad time. I am trying to answer your question.

Q. I am perfectly used to having a bad time.

A. And I am not saying this facitiously in any way. If you would send me to Dr. Fahey and if he examined me and he examined me in a way that he considered a complete, thorough examination --

Q. Customary examination?

A. Whatever. And then you ask me this question, I would feel qualified and competent to answer your question; otherwise, I cannot. I cannot answer for anybody else.

MS. PRENGLER: Before you start asking a question, I am going to state my objection on the record to your testifying as to what type of examination you got unless we can get some sort of admissible and competent testimony to the effect.

MR. KEITH: Well, I know what he did, but I can't relate it to the O.D. and the O.S.

Dr. Waldman, let us suppose that you performed your usual, customary, thorough examination, whatever that may include, and that another practitioner whom we will identify hypothetically for these purposes as Dr. Fahey, performs the same, usual, thorough and customary examination; that each of you arrives at a diagnosis. It may or may not be the same, is that correct?

A. That's correct.

Q. Because yours is a profession and there is room for judgment?

A. A great deal.

Q. And there is no precisely accurate diagnosis?

A. Okay.

Q. Is that true?

A. Yes.

Q. But each of you prescribes the same lens and frames ground to the same prescription, and that the prescriptions are delivered properly compounded, centered and with the same quality materials. If one charges as much as twenty dollars more than the other charges to the patient, is there any reason -- and I am just asking you to assume that is true. Is there any reason that you can give why, if it's your charge that is higher, why it should be or why the patient should pay the additional charge?

A. The only answer that I can give to that question. Mr. Keith, is that it would seem obvious to me that the doctor charging the lesser fee would consider that his judgment wasn't as good, wasn't worth as much.

Q. All right. Now, from the patient's standpoint what benefit does he derive from the greater charge or the person charging the greater fee?

A. I am not sure that I understand where you are now.

Q. You charge seventy, let us say, and hypothetically Dr. Fahey charges fifty for the same thing. What benefit does the patient get?

A. Wait a minute. You said for the same thing?

Q. That's correct.

A. I don't agree that it's the same thing.

Q. What is different?

A. I don't know. Send me to Beaumont, or --

Q. I asked you to assume a hypothetical examination, the examination is the same.

A. I would have to conclude if everything were the same, that unless -- I don't know what. The fee would probably have to be much the same if everything were the same.

Q. How can you justify the higher charge?

A. I don't know anything about anybody else's charges, Mr. Keith. All I know is that my fees are what I consider to be fair, and my patients consider them to be fair, as well. What somebody elso does, I can't answer for.

Q. By the same token, if a man charges less than you do, one has the perfect right to do that, does he not?

A. Yes. Anyone has a perfect right just as lawyers have a perfect right to charge for their services, and I dare say that all lawyers' services don't cost the same thing.

Q. That has been my experience, as well.

A. And the same sort of thing could be applied, I would think.

MS. PRENGLER: You get what you pay for.

Q. Is that what you are saying?

A. I think that's the usually the case in our economy, isn't it?

Q. And that the higher charge necessarily carries with it a greater service?

A. I would think that it would carry a greater likelihood.

Q. How can you, other than by polemics, justify this so-called fee attached to the dispensing of the lens when that is the service performed by an optician rather than an optometrist?

A. No, it's not a service performed by an optician, Mr. Keith, because, first of all, the prescription has to be written, the lens has to be designed, the decision has to be made about the, for example, height of the segment, decentration, various other things that go into the lens. The lens has to be evaluated when it is finished. It has to be verified. There any many many things that go into the services in providing the lens.

Q. This twenty-five dollar charge does not include your writing the prescription?

A. The twenty-five dollar charge includes the examination itself up to the point of writing the prescription.

Q. Now, let us suppose that I was your patient and wanted you to write my prescription, and I wanted to take it elsewhere to have it filled. Do I have that right?

A. You certainly do.

Q. Then do you charge me additionally to write the prescription?

A. Yes, I do.

Q. How much do you charge for that?

A. Generally five dollars.

Q. So that I could take the prescription and leave, and I would have paid you thirty dollars, is that correct?

A. That's right.

Q. And I would have gotten the examination, the prescription written. You would have designed the frame, you would have allowed for decentration, allowed for the height, size of the segment?

A. All the information, all the pertinent information would be on the prescription, yes.

Q. And then I can take it to TSO or wherever I want to take it and have it filled?

A. Yes.

Q. And I don't owe you any money?

A. That's correct.

Q. So, what are these other charges incidental to this frame and lens service besides writing the prescription?

A. Well, I told you, Mr. Keith, that I think I enumerated a moment ago some of the other services.

Q. You did, and all those are related to writing the prescription, are they not, decentration, size, height?

A. No. You can't get the decentration on something like this unless you know the frame, and, also, under the circumstances I would simply be giving you a

prescription and indicate if it were a bifocal, for example, the type of bifocal that I would recommend, and a pupilary distance.

Q. After you had made the thorough examination that I am sure you make, with your knowledge and skill, how long does it take to write the prescription?

A. It all depends on how complicated it is. It doesn't generally take a long time, but it requires a great deal of judgment.

Q. I concur. If you took my glasses to write that prescription, once you had made the examination, it would take fifteen seconds, twenty seconds?

A. I don't know.

Q. Would it take that long?

A. Actually writing down numbers doesn't take very long, if that's what you are getting at, but there's a great deal more involved than writing down the numbers.

Q. It's the professional judgment that is of value?

A. I would think so. You are a professional man, I would think you would concur with that.

Q. When you were on the Board and you said there was this Investigating Committee, who were the members of that Investigating Committee?

A. As I remember, Dr. Burton, Jack Burton was chairman of that committee.

Q. Who else was on it with him?

A. Dr. Cohen.

Q. Three of you, Dr. Burton, Cohen and Waldman?

A. I wasn't a member of the committee. As chairman I was an ex-officio member of all committees.

Q. Were both of those committee members TOA members?

A. Yes.

Q. When these investigators went around and you all had these letters of reprimand and informal conferences with the licensees who were in violation of basic competency, did this include just -- did the people who you found to be violating the basic competency, were they exclusively non-TOA members?

A. No.

Q. Did they include TOA members?

A. Yes.

Q. You are not suggesting that they were violating basic competency because they were advertising?

A. No.

Q. Or that they were under some volumetric patient pressure?

A. I would think that that would be more likely to happen, yes.

Q. Well, were these TOA members under some volume pressure?

A. No, I wouldn't think they were.

Q. Now, you said that the principal violation or the

first in order of numbers was in Section 10 of Basic Competency, which relates to the peripheral vision. As a practical matter, isn't that about the simplest and less time consuming?

A. Yes, exactly right.

Q. It takes three seconds to do it?

A. Less. That was the great surprise.

Q. What is your explanation?

A. I have none.

Q. Would you say that's more related to human nature than it is mode of practice?

A. Perhaps.

(Whereupon a short recess was had.)

MR. KEITH: I have no further questions. Thank you.

MR. NIEMANN: I do.

FURTHER EXAMINATION BY MR. NIEMANN:

Q. Doctor, regarding the violations of the Basic Competency Rule when you were chairman of the Optometry Board, was the occurrence and severity of violations more prevalent when the doctor was under time and volume pressures?

A. Yes.

Q. Does your prescription-writing charge of five dollars include a lens verification service by your office, if and when the patient brings the glasses back for verification?

A. Yes.

Q. Is, indeed, that one of the purposes of the five dollar charge?

A. Yes.

Q. To encourage the patient to bring the lenses back for verification?

A. Yes, it is.

Q. Doctor, is the perfect examination and perfect judgment in writing the prescription all for naught if the lens is gound or fabricated incorrectly?

A. Yes, it is.

Q. Does the five dollar charge, which includes lens verification, encourage the patient to have the lens verified by your office?

A. Yes.

Q. Is the reason that he has already paid for it, and, therefore, he doesn't want to lose the benefit of something for which he has already paid?

A. I would think so.

Q. Do you explain to your patients the advisability and the necessity of bringing the lens to your office for verification?

A. Yes, I do.

Q. Doctor, earlier when we were discussing the dangers inherent from incorrectly ground prescriptions, we concentrated mainly on eyeglasses rather than contact lenses. Could you briefly enumerate for us some of the physical health

dangers that can occur from improperly manufactured or improperly fitted contact lenses?

A. Well, under these conditions there can be things like abrasions of the cornea and irritations of the lids that can be very unpleasant and very uncomfortable and sometimes dangerous as well.

Q. You mean there's a risk of infection and permanent damage from incorrectly --

A. Yes, there is always that possibility.

Q. Is this accentuated when there is a de-emphasis on follow-up care following the initial fitting of the contact lenses?

A. I would think so.

Q. Is this one of the reasons why contact lenses are generally higher in price than eyeglasses?

A. The additional service required, the additional time required is the reason, yes.

Q. Now, when a doctor is under a time and volume restraint, is there a tendency or is there pressure to relegate this follow-up care and follow-up examination to non-optometric personnel?

A. Often that's true.

Q. Is this one of the shortcuts or eliminations that can occur and do occur where a doctor tries to increase volume?

A. I suppose that's possible. We don't do this in our office.

Q. I am talking about from your experience as a Board member, seeing violations of the Basic Competency

Rule and other violations of good optometric care?

A. I would think so, Mr. Niemann.

Q. Since the danger of permanent damage to the eyeball and damage to the -- infection and irritation are so serious in contact lens cases, could you briefly outline for us the kind, nature and time involved of follow-up care in contact lens cases?

A. Well, I routinely in my office, for example, see a patient for examination. I have him back to dispense the contact lenses and give him the necessary instructions, and this takes usually an additional hour. Routinely I see him in a week for an evaluation, and routinely after that in two weeks later, routinely after that in three months, and then again at the end of six months. This is assuming that there are no complications, no changes necessary, that this is a perfectly -- this is a perfect type of case. Otherwise, we see people as often as it is necessary to see them to give them the protection and the vision that they need.

Q. In your judgment is it imperative that this follow-up care be done by an optometrist?

A. Yes, I think it is imperative. I think it's important. I think it is, and that's why I do it because I think that the judgment involved is very important here.

Q. Is it your belief that if there is sufficient time and volume pressures, that the optometrist will be tempted to relegate that type of responsibility to a non-optometric personnel?

A. I think yes. I think that's only part of it, though. I think that if there are time pressures and volume pressures, that he not only would be tempted to relegate this to other personnel, but I think that

there might be some elimination of some of these visits and some of the time.

Q. Is this one way, by the elimination of certain steps and the relegation of follow-up care to non-optometric personnel? Are these ways in which contact lens' total prices can be reduced?

A. I suppose they could be.

Q. About how many members are there in the student body of the University of Houston School of Optometry?

A. Currently there are, I believe -- let's say currently before the last graduation I believe there would be somewhere between two hundred fifty and three hundred students. That's going to increase, however, in September because they are going into a new building that will accommodate more students.

Q. If the membership of TOA had been afraid of competition, would they have actively supported the creation of the school?

A. Mr. Niemann, not only was the membership of TOA not afraid of competition, we have virtually encouraged competition, encouraged young people. We recruit for the schools. I was chairman of the American Optometric Association's Vocational Guidance Committee for several years, and it was my duty to recruit students over the nation to go to the colleges of optometry throughout the nation, and certainly if we were trying to stifle competition, we wouldn't be doing this sort of thing at all.

MR. NIEMANN: No more questions.

MS. PRENGLER: I only have one question.

FURTHER EXAMINATION BY MS. PRENGLER:

Q. For the most part, would you say that the more time that you spend with a patient and the higher degree of skill that you feel the service you're providing for the patient requires, the higher your fee will be?

A. I am not sure that -- I think that I understand your question. I am not absolutely sure, but what I had been trying --

MR. KEITH: May I ask by that if you mean his fee is tied to the level of skill and time that he devotes?

MS. PRENGLER: Right.

MR. KEITH: Then it would vary depending on the patient?

MS. PRENGLER: Right.

THE WITNESS: I think that what I am trying to say to you is that the fee is determined to a great extent by the length of time that is spent, yes, simply because there are so many hours in the day, and if I could see four times as many patients in a given time, it's probably true that my fee would be less, but it's also true that the patients wouldn't get the time and attention and the care that they get under the circumstances.

Q. But your fees would vary from case to case with the factor or time and skill playing an important role in what the ultimate fee would be?

A. Yes.

Q. Okay. That's all.

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

DR. N. JAY ROGERS	§	
VS.	§	CIVIL ACTION NO. B-75-277-CA
DR. E. RICHARD FRIEDMAN, ET AL	§	
	§	

NOTICE TO TAKE DEPOSITIONS BY WRITTEN INTERROGATORIES

Notice is hereby given that the Plaintiff will take the deposition of Dr. Lee Benham, 6346 Waterman Street, St. Louis, Missouri 63130 on April 26, 1976, by written questions before Mr. Robert D. Perry, 703 Cranbrook Drive, St. Louis, Missouri 63101. The questions are attached.

MEHAFFY, WEBER, KEITH
& GONSOULIN

BY: _____
of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

CERTIFICATE OF SERVICE

The above and foregoing instrument was delivered to opposing counsel by U.S. Mail, Certified, return receipt requested on the 16th day of April, 1976.

_____

WRITTEN INTERROGATORIES

TO: Dr. Lee Benham, 6346 Waterman, St. Louis, Missouri 63130

1. **State your name, age and residence address.**
2. **By whom are you employed?**
3. **What is your occupation?**
4. **What is your educational background?**
5. **What is your employment background?**
6. **List any professional organizations or associations of which you are a member.**
7. **List by title, name of publication, publisher, date, place of publication, and co-authors each article or paper which you have authored.**
8. **Have you participated in or conducted any studies with respect to the disciplines of optometry, opticianary, the dispensing of opthalmic supplies, or the provision of optical goods and services?**
9. **Describe each of such studies in detail.**
10. **Have you written any papers, whether published or unpublished, on the disciplines of optometry, opticianary, the dispensing of opthalmic supplies, or the provision of optometric goods and services?**
11. **If you have written any such papers, attach a copy of each to this deposition.**
12. **If you have testified in any judicial proceedings, please list: the style of the case, the court and the party or agency who called you as a witness.**

13. (a) Upon the basis of your studies and investigations, do you have an opinion as to whether or not there is a correlation between commercial advertising, or the lack thereof, and the retail price of optometric goods and services?

    (b) What is your opinion?

    (c) What is the reason or basis of such opinion?

14. Is the use of a commercial trade name, such as "Texas State Optical" a form of "commercial" advertising?

15. (a) In your opinion, based upon your studies and investigation, will there be a correlation between the elimination of commercial trade names and the price at which persons can obtain optical goods and services at retail in Texas?

    (b) What is your opinion?

    (c) What is the reason or basis of such opinion?

16. From the vantage point of a professional economist, what purpose does a trade name serve in the field of optometric services and products?

17. What type of information, if any, does a trade name communicate?

18. (a) In your opinion, will elimination of the use of a trade name from the practice of optometry in Texas effect the consumer of optometric goods and services?

    (b) In what way will the consumer be effected?

    (c) Why?

19. (a) In your opinion, will elimination of the trade

name from the practice of optometry in Texas effect the present users of trade names within optometry?

    (b) In what way?

    (c) Why?

20. In your opinion, will elimination of the trade name from the practice of optometry in Texas effect the practitioners of optometry who do not now use a trade name?

    (b) In what way?

    (c) Why?

21. (a) In your opinion, will the state-enforced separation of the optometrist from the opticianary wherein he has traditionally practiced under a trade name effect the consumer of optometric goods and services in Texas?

    (b) In what way?

    (c) Why?

22. (a) In your opinion, will the state-enforced separation of the optometrist from the opticianary wherein he has traditionally practiced under a trade name effect the present users of trade names?

    (b) In what way?

    (c) Why?

23. (a) In your opinion, will the state-enforced separation of the optometrist from the opticianary wherein he has traditionally practiced under a trade name effect the practitioners of optometry who do not now use a trade name?

    (b) In what way?

(c) Why?

24. (a) Have your studied the activities of "professional associations" within the field of optometry?

(b) Have you studied the activities of the American Optometric Association (AOA) and the state associations affiliated with it?

(c) Based upon your studies, what have the associations done?

25. (a) Do you have an opinion of whether there is any correlation between the provision of quality eye care products and services and the use or not of a commercial trade name?

(b) What is your opinion?

(c) What is the basis of your opinion?

26. As a professional economist who has studied and reported upon the price and provision of optometric goods and services, do you have an opinion as to the overall consequences of the prohibition of the use of trade names in the practice of omptometry in Texas?

(b) What is that opinion?

(c) What is the basis of your opinion?

27. Are you familiar with or have you been in any way associated with or employed by Texas State Optical?

MEHAFFY, WEBER, KEITH
& GONSOULIN
Attorneys for Plaintiff

By_____
Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF

TEXAS

BEAUMONT DIVISION

DR. N. JAY ROGERS	)(	
	)(	
VS.	)(	CIVIL ACTION NO.
	)(	B-75-277-CA
DR. RICHARD E.	)(	
FRIEDMAN, ET AL	)(	

CROSS INTERROGATORIES TO BE PROPOUNDED TO DR. LEE BENHAM

TO: Dr. Lee Benham, 6346 Waterman, St. Louis, Missouri 63130.

1. Dr. Benham, are you familiar with the Texas Optometry statute which requires an optician to obtain an advertising permit and to accurately advertise prices in various categories of eyeware that he or she provides?

2. If you are not, would you please briefly examine the enclosed copy of Article 4552, Section 5.10, attached as Exhibit "A", which deals with advertising permits and which was enacted in 1969?

3. (a) In your opinion, is it beneficial for consumers to be furnished with prices in all categories as required by the Texas statute which has been furnished to you?

   (b) If your answer is no, state your reasons why.

4. (a) In your opinion, does disclosure of prices in various categories better inform the consumer

of possible price ranges of eyeware than if only one price or one category were advertised?

(b) If your answer is no, state your reasons why.

5. (a) In your opinion, does disclosure of prices in the statutory categories in media advertising lessen the chance for "bait and switch" advertising?

   (b) State your reasons for your answer.

6. (a) In your opinion, does media advertising by opticians tend to encourage the consumer to go to the advertising optician first rather than the optometrist or physician first, in seeking eyecare?

   (b) If your answer is no, state your reasons why.

7. (a) Generally speaking, does advertising increase the overhead expenses of the optician, optometrist, or physician who advertises?

   (b) If your answer is no, state your reasons why.

8. (a) Generally speaking, does advertising by opticians tend to require a higher volume of sales of eyeglasses to justify advertising in newspaper and television?

   (b) If your answer is no, state your reasons why.

9. (a) In your opinion, if an optometrist is employed by an optician or another optometrist who advertises regularly, is it more likely that his employer would emphasize a high volume of sales of eyeglasses than if the optometrist was employed by an optician or optometrist who did not advertise.

(b) State your reasons for your answer.

10. (a) In your opinion, if an optometrist is employed by an opticin or another optometrist who advertises regularly, is it more likely that his employer would emphasize speed of processing the sale of eyeware and/or the examination of the patient than if the optometrist was employed by an optician or optometrist who did not advertise.

(b) Why?

11. (a) In your opinion, if an examining optometrist is employed by an optician or optometrist who advertises regularly under a trade name, and the address of the examining optometrist and the advertising optician or optometrist are the same, are the examining optometrist's patients likely to come to him because of his personal reputation for professional competence as opposed to some other reason such as advertising?

(b) State your reasons why.

12. Are your aware that Texas State Optical and Lee Vision are the two largest retail optical supply chains in Texas?

13. Are you aware that Texas State Optical, although it can advertise under the Texas statutes, advertises in cities where it has offices, without ever mentioning prices or reference to price?

14. Have you ever made a study of the effect of advertising of eyeglasses with reference to price, as compared to advertising of eyeglasses without reference to price? If so, would you please attach copies of such study or studies.

15. Have you ever made a study of the effect of advertising on the quality of eyecare. . .such as the effect of advertising on the quality of lenses, accuracy of prescription grinding, and/or speed of examinations by optometrists associated with or employed by the optician or optometrist who advertises? If so, please attach a copy of such study or studies.

16. Could you give a brief explanation of why more recent data that 1963 was not used in your 1972 article entitled "The Effect of Advertising on the Price of Eyeglasses"?

17. In your article entitled "The Effect of Advertising on the Price of Eyeglasses," did you take into account the general consumer price index differences between the various states covered by the samples, for example, the difference between general consumer prices in Texas as compared to the general consumer price index in New York?

18. Were the prices reported in "The Effect of Advertising on the Price of Eyeglasses" adjusted to account for these regional differences in price indexes?

19. The conclusions reached in "The Effect of Advertising on the Price of Eyeglasses" appear to be heavily affected by the price samples obtained from the North Carolina survey. On the basis of the North Carolina samples, are eye examinations performed by physicians generally more expensive than eye examinations performed by optometrists in the same locale?

20. (a) Did the fact that 55.3% of all persons sampled in North Carolina obtained their eyeglasses from a physician tend to increase the cost of

eyeglasses in the North Carolina samples as compared to your findings in the other states surveyed?

(b) If your answer is no, why not?

21. What are the "other laws [in North Carolina] which would tend to raise prices independently of advertising regulations", which you referred to in "The Effects of Advertising on the Price of Eyeglasses"?

22. (a) In "The Effects of Advertising of the Price of Eyeglasses", you stated that "a few non-routine items (treatment) may have been included in the sample." If this was the case, were the North Carolina sample prices more susceptible to being effected by these "non-routine" items (treatment)" assuming only physicians were legally permitted to administer "treatment" to the eye?

(b) State your reasons for your answer.

23. Did the North Carolina data represent 42% of the total "advertising prohibited" data in "The Effects of Advertising on the Price of Eyeglasses"?

24. Did the state of North Carolina represent 16.6% of the sample states which prohibited advertising in the study referred to in question 24?

25. (a) If the North Carolina data were excluded from your sample, wouldn't the sample have the effect of "suggesting" only about a 13% increase in eyeglass costs rather than a 25% to 100% increase as stated in Section IV of "The Effects of Advertising on the Price of Eyeglasses"?

(b) If your answer is no, why?

26. (a) If the New York data were excluded from the samples, would it significantly affect the conclusions reached in "The Effects of Advertising on the Price of Eyeglasses"?

(b) State your reasons why.

27. In the conclusion of "The Effects of Advertising on the Price of Eyeglasses", did you state: "Several professors in economics and marketing at the University of Chicago were asked whether they thought the price of eyeglasses would increase or decrease if advertising were prohibited. Of those individuals polled, approximately 40% of the economists and 100% of those in marketing expected prices to be the same or lower if advertising was prohibited."

28. Do you believe each and every one of the marketing professors you polled was wrong in their opinion referred to above?

29. (a) Were there grant monies from one or more public or private sources used in the research, writing, and/or publication of "The Effect of Advertising on the Price of Eyeglasses"?

(b) If so, please name the source of those grant monies and include any institutional or governmental agency controlling, administering, or approving of such grant or grants?

30. (a) Please read the attached letter marked Exhibit "B" and assume it to be a complaint made to the Attorney General's Office in Texas. In your opinion, is this type of problem more likely to occur when a person's eyes are examined and contact lenses prescribed by an optometrist

practicing under a trade name than by an optometrist not practicing under a trade name?

(b) If your answer is no, state your reason why.

31. (a) In your opinion, is a patient more likely to know the specific name of the individual optometrist who treated him or her when that patient goes to a self employed optometrist or when that person goes to an optometrist practicing under a trade name?

(b) Please state your reasons.

32. (a) You received a copy of these interrogatories several days prior to the actual taking of this deposition. Have you discussed either the questions or possible answers with the plaintiff, his agents, and/or his attorney?

(b) If so, whom did you discuss it with?

Respectfully submitted,

JOHN L. HILL

Attorney General of Texas

DOROTHY PRENGLER
Assistant Attorney General

s/s

RICHARD ARNETT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-4721

Attorneys For Defendants In Their Official Capacities

CERTIFICATE OF SERVICE

(omitted in printing)

EXHIBIT "A"

Section 5.10. Advertising by Dispensing Opticians. (a) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper or by radio, television, window display, poster, sign, billboard or any other means or media any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles or parts thereof which is fraudulent, deceitful or misleading, including statements or advertisements of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning.

(b) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper, or by radio, television, window display, poster, sign, billboard or any other means or media, any statement or advertisement of or reference to the price or prices of any eyeglasses, spectacles, lenses, contact lenses or any other optical device or materials or parts thereof requiring a prescription from a licensed physician or optometrist unless such person, firm or corporation complies with the provisions of the Subsections (c)-(j) of this section.

(c) The person, firm or corporation shall obtain from the board an "Advertising Permit," which permit shall be granted to any person, firm or corporation which is engaged in the business of a dispensing optician in Texas.

(d) Such person, firm or corporation shall after receipt of such permit, but before beginning any such advertising, file with the board a list of prices which shall be charged for such eyeglasses, spectacles, lenses, contact lenses or other optical devices or materials or parts thereof in each and all of the following categories:

(1) single vision lenses;

(2) kryptok bifocal lenses;

(3) regular bifocal lenses;

(4) trifocal lenses;

(5) aphakic lenses;

(6) prism lenses;

(7) double segment bifocal lenses;

(8) subnormal vision lenses;

(9) contact lenses.

(e) No change may be made in any such price advertisement until the change has been filed with the board.

(f) Any advertisement or statement published or displayed as above described which contains the price of any of the categories shown above shall also contain the prices of all other categories and all such items, and the prices thereof, shall be published or displayed with equal prominence. No advertisement which shows the price of items listed in the categories shown above shall contain any language which directly or indirectly compares the prices so quoted with any other prices of similar items. In the event an "Advertising Permit" is issued to a dispensing optician there shall be displayed

prominently in each reception room and display room of each office owned or operated by such dispensing optician a complete current list of all prices on file with the board as provided above. In showing the price of "all other categories and all such items" as required by this section, it shall be permissible to combine two or more categories into one general category of "all other lenses" and designate the price thereby of "up to $....." which represents the highest price of any lenses included within this combined (general) category. Should there be a category in which two or more price differentials exist, it shall be permissible for the category to have a single listing in the advertisement with the lowest and the highest price in the category designated.

(g) In the event the dispensing optician owns more than one office, the prices for all such eyeglasses, spectacles, lenses, contact lenses or other optical devices or materials or parts thereof in the same category shall be the same in all offices located within the geographical limits of a county or a city regardless of the name under which such dispensing optician operates such offices.

(h) All such eyeglasses, spectacles, lenses, contact lenses, or other optical devices or materials or parts thereof must conform to standards of quality as promulgated by the American Standards Association, Inc., and commonly known as Z80.1-1964 standards.
(Continued on Page 45)

EXHIBIT "B"

April 29, 1967

To Whom it May Concern:

Recently I purchased a pair of contact lenses for my son, Morris, at Texas State Optical Company. It was not known to us who actually fitted the lenses, therefore

when Morris experienced a painful condition in his eyes, as a result of wearing these lenses, we did not know who to call, since no one person's name had been made available to us. This painful condition became apparent after regular office hours, and since it grew steadily more painful, we found it necessary to call upon a local doctor in private professional practice, who up to this time was not known to us.

It is our considered opinion that a doctor in private professional practice, whose name and reputation is known to his patients, and to whom one can turn in a case of emergency, is better qualified to serve any and all persons who seek the benefit of proper professional vision care.

Very truly yours,

s/s
Archie Ray Kelly

3028 Golfing Green
Farmers Branch, Texas

[In the United States District Court
for the Eastern District of Texas]

DEPOSITION OF LEE KENNETH BENHAM

* * *

DIRECT INTERROGATORIES

TO THE FIRST DIRECT INTERROGATORY HE SAYS:

Lee Kenneth Benham, age thirty-five. I live at 6346 Waterman Avenue, St. Louis, Missouri.

TO THE SECOND DIRECT INTERROGATORY HE SAYS:

Washington University, in St. Louis.

TO THE THIRD DIRECT INTERROGATORY HE SAYS:

I am an economist.

TO THE FOURTH DIRECT INTERROGATORY HE SAYS:

My undergraduate training was in mathematics at Knox College in Galesburg, Illinois. My graduate training was in economics at Stanford University. I received a Ph.D. in economics at Stanford.

TO THE FIFTH DIRECT INTERROGATORY HE SAYS:

I was instructor and assistant professor of economics in the Graduate School of Business at the University of Chicago from 1967 until 1974. I have been an associate professor of economics in the Department of Economics and an associate professor of economics in preventive medicine in the Medical School at Washington University from 1974 until the present. In addition to my academic appointments, I have done consulting for the Department of Health, Education and Welfare

concerning proposed national health care programs, and the American Bar Association concerning the supply of and demand for lawyers and the impact of proposed changes in the educational requirements for lawyers.

TO THE SIXTH INTERROGATORY HE SAYS:

I belong to the American Economics Association and the Health Economics Research Organization.

TO THE SEVENTH INTERROGATORY HE SAYS:

"Migration, Location and Remuneration of Medical Personnel; Physicians and Dentists," *Review of Economics and Statistics* (August, 1968), with Alex Maurizi and Melvin Reder.

"Factors Affecting the Relationship Between Family Income and Medical Care Consumption," in *"Empirical Studies in Health Economics*, edited by Herbert Klarman (Baltimore; The Johns Hopkins Press, 1970), with Ron Andersen.

Readings in Labor Market Analysis,(New York: Holt, Rinehart & Winston, 1971), coeditor.

"The Labor Market for Registered Nurses; A Three Equation Model," *The Review of Economics and Statistics* (August, 1971).

"The Effect of Advertising on the Price of Eyeglasses," *The Journal of Law and Economics* (October, 1972).

"The Benefits of Women's Education Within Marriage," Journal of Political Economy, vol. 82, no. 2, Part II, March/April 1974. Reprinted in *Economics of the Family: Marriage, Children and Human Capital*, edited by Theodore W. Schultz (The University of Chicago Press, 1974).

"Health, Hours, and Wages," *The Economics of Health and Medical Care*, edited by Mark Perlman (London: Macmillan, 1974), with Michael Grossman.

"Women's Economic Returns from College, Graduate Education, and Nurses' Training Through Earnings and Marriage," in *Sex, Discrimination and the Division of Labor*, edited by Cynthia Lloyd (Columbia University Press, 1975).

"Price Structure and Professional Control of Information," *Journal of Law and Economics* (October, 1975) with Alexandra Benham.

"The Impact of Incremental Medical Services on Health Status 1963-1970," in *Equity in Health Services*, edited by Ron Andersen (Ballinger, 1975) with Alexandra Benham.

"Utilization of Physician Services Across Income Groups 1963-1970," in *Equity in Health Services*, edited by Ron Andersen (Ballinger, 1975), with Alexandra Benham.

TO THE EIGHTH INTERROGATORY HE SAYS:

Yes, I have.

TO THE NINTH INTERROGATORY HE SAYS:

In the first study, data on eyeglass and eye examination prices were obtained from a 1963 survey of a national sample of individuals. The prices paid for these services could be associated with the state of purchase. I was interested in comparing the prices paid by consumers in states with restrictions on advertising and in states without such restrictions. I became interested in this question because I grew up in Texas and was accustomed to the level of eyeglass prices there. When I moved to California, I was surprised at the much

higher prices for eyeglasses I observed there.

In the second study, done jointly with Alexandra Benham, I helped develop the questionnaire and code the data from a national sample of 10,000 individuals for 1970. In this study I was interested in pursuing the question of the effects of limiting information available to consumers on the prices consumers pay. Once again the prices consumers paid for eyeglasses could be associated with state of purchase. The states were classified according to several indices providing various measures of the restrictions placed on the availability of information about eye care providers in the state.

TO THE TENTH INTERROGATORY HE SAYS:

Yes. I have written two papers, one jointly with Alexandra Benham.

TO THE ELEVENTH INTERROGATORY HE SAYS:

The papers have been published in the Journal of Law and Economics. Copies are attached.

TO THE TWELFTH INTERROGATORY HE SAYS:

I testified in the case of Horner-Rausch Optical Company versus the Attorney General of Tennessee, in the First Circuit Court for Davidson County, Tennessee, concerning the restrictions placed on advertising of eyeglasses in that state. I was called as a witness by Horner-Rausch. I also testified in the case of Eckerd Optical Centers, Inc., versus the Florida State Board of Dispensing Opticians, in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. This case was also concerned with restrictions on information to consumers about eyeglasses. I was called as a witness in this case by Eckerd Optical Centers, Inc.

TO THE THIRTEENTH INTERROGATORY HE SAYS:

(a) Yes, I have.

(b) In my opinion, consumers generally pay substantially higher prices in states where commercial advertising is prohibited.

(c) In the two studies described above and attached to this deposition, I found that in those states in which the commercial information which could be provided to consumers was more limited, the price consumers paid was substantially higher. Consumers benefit from having more information about their options. If they do not know about alternatives, they cannot respond to them. If the amount of information available to consumers is limited, it has the effect of reducing competition which results in higher prices to consumers.

TO THE FOURTEENTH INTERROGATORY HE SAYS:

Yes. As noted on page 423 of our October, 1975 article in the *Journal of Law and Economics*, "...the removal of commercial stimuli from the environment (including advertising, brand name identification, and identification with well-known establishments) limits consumers' knowledge of current or potential alternatives and hence also limits their response to these alternatives."

TO THE FIFTEENTH INTERROGATORY HE SAYS:

(a) Yes.

(b) The prices will tend to go up.

(c) Trade names provide valuable information to consumers. If the use of trade names is limited, the options of consumers will be effectively limited. Competition will be reduced and prices will go up.

TO THE SIXTEENTH INTERROGATORY HE SAYS:

One of the most valuable assets which individuals have in this large mobile country is their knowledge about trade names. Consumers develop a sophisticated understanding of the goods and services provided and the prices associated with different trade names. This permits them to locate the goods, services, and prices they prefer on a continuing basis with substantially lower search costs than would otherwise be the case. This can perhaps be illustrated by pointing out the information provided by such names as Sears, Neiman Marcus or Volkswagen. This also means that firms have an enormous incentive to develop and maintain the integrity of the products and services provided under their trade name: the entire package they offer is being judged continuously by consumers on the basis of the samples they purchase.

If there were no trade names, individuals would have much greater difficulty obtaining information about the range of providers. They might know the providers in a given community well, but if they moved or if some of the providers moved, the problems of acquiring new information would face them. Without trade names, the generality of the information available would be reduced.

For a product which is not frequently purchased, like eyeglasses, the restrictions on information may have particularly severe consequences.

TO THE SEVENTEENTH INTERROGATORY HE SAYS:

The answer was given to the previous question.

TO THE EIGHTEENTH INTERROGATORY HE SAYS:

(a) Yes.

(b) Restrictions on the use of the trade name will

mean that consumers are less well informed about their options. Prices will rise and, because of the higher prices, fewer people will obtain eyeglasses.

(c) It is quite straightforward. Prices increase when consumers are less informed and competition decreases. Commercial providers can be hurt substantially if limitations are placed on the type of information they can provide to consumers. Placing limits on the use of a trade name is one of the most effective ways of limiting the information provided.

Trade names are of course not the only form of information generated by providers, but they are an important form. It is not surprising that in those states which place limits on the use of trade names, the commercial providers have a smaller share of the market.

Our 1975 study in the Journal of Law and Economics finds that in states where less commercial information is available (and trade names are an important dimension of this) the prices tend to be higher. In that study we also found that the less well-educated consumers were more adversely affected by the restriction on information than those with more education. The prices tend to go up more for the less educated, lower income individuals when such restrictions are imposed.

All groups were also adversely affected in that they obtained eye care less frequently where there were higher prices. This is a particularly unfortunate consequence of these restrictions. Many individuals are currently not receiving adequate eye care and these restrictions further raise the financial barrier for such care.

TO THE NINETEENTH INTERROGATORY HE SAYS:

(a) Yes.

(b) The demand for their services will be less than it would without the restriction.

(c) The trade name provides information about where consumers can go if they like the service. Without the trade name affiliation, such information is much more difficult for consumers to obtain.

TO THE TWENTIETH INTERROGATORY HE SAYS:

(a) Maybe.

(b) There will be some increased demand for their services because of the reduced competition from the commercial firms. Their prices will tend to rise. The effects of this on the income of the individual optometrist will be dampened by the influx of optometrists from other states and the reduced sales of glasses at the higher prices.

(c) I have answered this in the previous question.

TO THE TWENTY-FIRST INTERROGATORY HE SAYS:

(a) Yes.

(b) & (c) As stated earlier, the trade name conveys information. If the number of services covered under the trade name is reduced, then consumers can no longer depend upon the trade name to provide information regarding those services. Those who are currently using the commercial firms are obviously going to be worse off. In addition, those consumers who go to providers not operating under trade names will tend to pay higher prices. In the 1975 study in the

Journal of Law and Economics, we found that the prices charged by all providers tended to go up as information flows were more restricted.

Consequently, the adverse effects of reduced competition are not limited to the currect or future users at commercial firms.

TO THE TWENTY-SECOND INTERROGATORY HE SAYS:

(a) Yes.

(b) Adversely. Their market share will be less than it would be otherwise. Their competitive position will be weakened.

(c) The success of the commercial firms is very much a function of the information they can provide to consumers. In those states where severe limitations are placed on their ability to provide information about eye services, the commercial firms do not do well. Any firm would be hurt if the range of services provided under its trade name was limited. In this particular case, the adverse consequences are likely to be significant.

TO THE TWENTY-THIRD INTERROGATORY HE SAYS:

(a) Possibly.

(b) The answer is the same here as to question 20.

(c) The same as question 20.

TO THE TWENTY-FOURTH INTERROGATORY HE SAYS:

(a) Yes.

(b) Yes.

(c) The American Optometric Association and the state affiliates are quite explicit in their desire to

eliminate the types of information generated in the usual process of commercial exchange. Quoting from page 423 of the 1975 Journal of Law and Economics paper, "From the point of view of the profession, restricting information may be one of the most effective politically acceptable methods available for constraining the behavior of suppliers and consumers in the desired direction." In my view, these efforts to restrict information, including trade name restrictions, are a significant restraint in trade.

TO THE TWENTY-FIFTH INTERROGATORY HE SAYS:

(a) Yes.

(b) In my opinion, reducing the information available to citizens of a state by placing restrictions on trade names will have the effect of adversely affecting the quality of eye care of the citizens of the state.

(c) For several years I have looked into this question and have found no systematic evidence to suggest that, for those who receive eye care, the quality of eye care is lower in a state like Texas which has commercial advertising, which includes trade names, than in states without commercial advertising. There are, of course, specific examples of bad care provided by trade name firms, but there are also specific examples of bad care by non-trade name providers. I have seen no evidence which suggests that the quality of care, for those who receive eye care, is generally lower in Texas than in states which are more restrictive.

The reason I say that quality of care will tend to be lower when less information is provided is because less information will mean higher prices and that will mean fewer people will obtain eye care and eyeglasses. They will obtain glasses less frequently and hence their glasses will tend to be less suited to their current

problems, if they have any glasses at all. This is particularly unfortunate since eyes tend to deteriorate more rapidly with age, and hence this group is particularly adversely affected by the higher prices.

The quality of care is dependent not only on the quality for those who receive care, but also upon the frequency with which they receive care. Many people are currently not receiving proper eye care according to the professional representatives. To quote from my 1975 article on page 445, "Professionals have asserted that the utilization of eye care in the United States is approximately half the optimal rate."

My assertion that fewer people will receive care is based on results from the 1975 study. Table 4 on page 439 of that study shows the prices and the frequency with which people obtain eyeglasses in the more and less restrictive areas.

TO THE TWENTY-SIXTH INTERROGATORY HE SAYS:

(a) Yes.

(b) Higher prices and fewer people obtaining eye care. Our evidence suggests that the less educated, less sophisticated, lower income consumer will hurt even more than the average consumer.

(c) The evidence from my two studies and all the other evidence I have seen.

TO THE TWENTY-SEVENTH INTERROGATORY HE SAYS:

I grew up in Texas so I was familiar with the name Texas State Optical when I was young. I was contacted approximately two months ago about this case and agreed to testify. Both of my studies were completed prior to this contact with Texas State Optical. I have

never owned any stock in Texas State Optical, have never been employed by Texas State Optical, have never accepted any compensation from Texas State Optical, nor am I accepting compensation for testifying in this case.

LEE KENNETH BENHAM

Subscribed and sworn to before me this__day of_____, A.D., 1976.

Notary Public within and for the
County of St. Louis,
State of Missouri.

My commission expires September 15, 1979.

* * *

[In the United States District Court
for the Eastern District of Texas]

DEPOSITION OF DR. LEE BENHAM

TO THE FIRST CROSS INTERROGATORY HE SAYS:

Yes.

TO THE THIRD CROSS INTERROGATORY HE SAYS:

a) Probably not.

b) Requiring extensive price disclosures will have the effect of raising the cost of providing any information to the consumer and would likely have the effect of reducing the amount of information actually provided. If certain eyeglass specifications comprise a very small part of the market, the cost of advertising those items may greatly exceed any offsetting economics resulting from the advertising. This statute has all the appearance of a tax on advertising and is likely to work to the detriment of the average consumer in the state.

TO THE FOURTH CROSS INTERROGATORY HE SAYS:

a) The state does not require price disclosure.

b) The statute states that no one can advertise price unless they obtain a permit and advertise the prices of all items listed with equal prominance. In virtually no markets do we observe all items given equal prominance irrespective of their volume of sale. Such a requirement will make any advertising more expensive and consequently there will be less of it. On net, I would guess that most consumers would be less well informed as a consequence of this requirement than would be the case without restrictions on advertising.

TO THE FIFTH CROSS INTERROGATORY HE SAYS:

In my opinion, it is better to have one price advertised than none at all. As noted above, since the current price advertising statute is in effect a tax on advertising, there will be less advertising and most consumers will be less well informed. Since they are less informed, they will be more vulnerable to being charged higher prices.

The most obvious consequence of bait and switch is that consumers end up paying more. Therefore if bait and switch were a common consequence of advertising, consumers would on average end up paying more in states which permitted advertising. All the available evidence suggests just the opposite. The prices consumers end up paying are lower in the states with fewer restrictions on advertising. This suggests to me that the problem of bait and switch is much less important than the adverse consequences of restrictions on information.

I have seen no evidence to suggest that the problem of bait and switch arises frequently. Bait and switch tactics are, I believe, against the law. If the problem does arise, then specific, inexpensive, remedies can be developed.

TO THE SIXTH CROSS INTERROGATORY HE SAYS:

a) Probably, although I have no direct evidence.

TO THE SEVENTH CROSS INTERROGATORY HE SAYS:

a) My guess is that it would tend to reduce the overhead.

b) The restrictions on advertising do not eliminate the desire of the consumer for information or of the providor to make it available. If advertising is

restricted, then the providors will attempt to make their existence known in other ways. One of the most important ways is in terms of location. A convenient and visible location which will attract consumers is generally going to be more expensive. This is an alternative and expensive form of substitution for advertising. Another substitute for the more conventional forms of advertising is to provide elegant surroundings in the waiting room. From the consumers point of view, the convenience and posh surroundings are not without value but are an inefficient substitute for having more direct information. This is not to say that in states with advertising, such amenities will be absent. Certainly not. Only that these are two dimensions along which overhead costs will likely increase when advertising is restricted.

There is another dimension in which overhead costs are lower is states which permit advertising. States with advertising restrictions appear to have higher frequency of low volume, high priced outlets which have high overhead per paid or eyeglasses sold. In the more competitive states, (as Texas has traditionally been) these high overhead operations have faced more competitive pressure and hence have had a smaller share of the market. The evidence with which I am familiar suggests that the overhead costs per pair of glasses sold are substantially higher in the states with advertising restrictions.

TO THE EIGHTH CROSS INTERROGATORY HE SAYS:

a) That is stating the proposition incorrectly.

b)Advertising in newspapers or television will sometimes result in higher volume of sales. A firm doesn't generally increase its volume so that it can advertise; the advertising sometimes leads to a higher volume.

TO THE NINTH CROSS INTERROGATORY HE SAYS:

a) I do not know.

b) The firms which advertise could well have a higher volume per firm. The number of employees per firm is likely to be higher in the firms which advertise. I would also expect that the optometrists in the advertising firms spend less time waiting for patients.

There is no a priori reason to believe that the pressures on the employees in the advertising firms will differ from the pressures on employees of non advertising firms. The pressures to keep prices down will be less for all providers in the states with restrictions on advertising.

TO THE TENTH CROSS INTERROGATORY HE SAYS:

a) I see no reason why.

b) The pressures placed on employees in eye firms, as in all firms, will depend upon many factors. There is no reason why advertising, per se, should lead to systematically different incentives. I would expect greater specialization in the advertising firms where the optometrist is less frequently involved in tasks which do not require his training.

TO THE 11th CROSS INTERROGATORY HE SAYS:

a) In my opinion, the consumers will generally make a sensible choice within the limitations of the information available to them.

b) There is every reason to believe that the quality of service varies across optometrists (just as it does in the case of physicians, dentists, or other professionals). The individual consumer has great difficulty in obtaining information about these differences including, the

"personal reputation for professional competence." One of the principal reasons is that the professional associations go to considerable lengths to ensure that an optometrist will not give a candid appraisal of another optometrist to a patient. This is shown in the Code of Ethics of the American Optometric Association. as quoted in footnote 9 on pages 424 and 425 of our article on "Regulating through the Professions." "The optometrist, in his relations with a patient under the care of another optometrist, should observe the strictest caution and reserve; should give no derogatory hints relative to the nature and care of the patient's disorder. . .When an optometrist succeeds another optometrist in the charge of a case, he should not make comments on, or insinuations regarding the practice of the one who preceded him."

What all this means is that the consumer is on his own in making judgments about providers of service because very little information about the quality differences across practioners is provided. If consumers go to a source of care and are satisfied with the service and price, they will go back. If they are not satisfied, they won't go back.

This is true both for sources of care which advertise and for those which do not. The difference is that with advertising, some dimensions of the prospective transaction are known before the transaction is underway.

TO THE 12TH CROSS INTERROGATORY HE SAYS:

That was my impression.

TO THE 13TH CROSS INTERROGATORY HE SAYS:

I did not know it, but it does not surprise me given the nature of the statute discussed above.

TO THE 14TH CROSS INTERROGATORY HE SAYS:

One section of the study published in 1972 was concerned with this issue. This study is already in evidence.

TO THE 15TH CROSS INTERROGATORY HE SAYS:

There is a discussion in the 1972 and 1975 studies on the question of quality. Both have been put in evidence. At the time these studies were published, I had seen no systematic evidence suggesting that the quality of eye care or eye glasses differed as between states with and without advertising for those who received eye care. I know of no new evidence which shows a systematic difference. The quality of eye care for the population as a whole will be adversely affected by the restrictions and consequent high prices since fewer people will obtain eye care.

TO THE 16TH CROSS INTERROGATORY HE SAYS:

At the time I began the study, the 1963 NORC survey was the only data I knew about that contained information about the prices individuals paid for glasses. Had better information been available, I would have used it. When the 1970 survey described in out attached study, Regulating the Professions, became available, we used it.

TO THE 17TH CROSS INTERROGATORY HE SAYS:

No, the consumer price index is not available on a state basis. It is noteworthy that the South and Southwest generally had a lower cost of living at the time the survey was made. A larger proportion of the restrictive states examined in the earlier study were located in the South. Hence, if anything inclusion of the

cost of living differences is likely to increase the real cost differentials as between the restrictive states and the unrestrictive states.

One way to examine this question directly is to compare the prices on contiguous states which have difference laws. Louisiana, Arkansas, Oklahoma and New Mexico have traditionally been much more restrictive on the question of providing information to the consumer than Texas. In my 1972 article in the *Journal of Law and Economics*, I made a personal survey and compared the prices of eyeglasses in Texas and New Mexico. This is discussed in footnote 14 on page 344 of that study. I found the prices to be 22% higher in New Mexico. For technical reasons discussed in that footnote, this will be an understatement of the differences consumers actually pay in the two states.

I have also made some comparisons of the prices consumers pay in Texas and the more restrictive surrounding states in 1970 using the data described in "Regulating through the Professions" published in the *Journal of Law and Economics* in October, 1975. As compared to Texas, the prices of eyeglasse in Oklahoma were 35% higher. The prices in Arkansas were 16.5% higher than in Texas, and the prices in Louisiana were 31% higher than in Texas. Unfortunately, no prices were available from New Mexico even though a substantial number of people were surveyed there. The fact that none of these sampled in New Mexico obtained glasses within the year presumably is one consequence of the higher prices in the state:

TO THE 18TH CROSS INTERROGATORY HE SAYS:

No. The answer to the previous question does look at the price variation within the region.

TO THE 19TH CROSS INTERROGATORY HE SAYS:

We did no special analysis on the price differences in the cost of examinations in North Carolina. In both studies, the primary emphasis was on the price of eyeglasses.

TO THE 20TH CROSS INTERROGATORY HE SAYS:

a) and b) This question was not examined directly in the 1972 study. However, direct evidence is available in the 1975 study. In that study, as shown in Table 5 on page 442, the prices charged by optometrists for eyeglasses tended to be slightly higher than the prices charged by physicians in the restrictive states such as North Carolina.

TO THE 21ST CROSS INTERROGATORY HE SAYS:

Restrictions on the ability of commercial establishments to hire an optometrist is the principal restriction which I had in mind.

TO THE 22ND CROSS INTERROGATORY HE SAYS:

Had more non-routine items been provided by physicians and had the items been inappropriately coded up as part of the eyeglass cost and had our extensive coding procedure missed those items, then the price in North Carolina would have been affected more by their inclusion. I mentioned this as one possibility in footnote 13 of that study. More recent evidence suggests that the shift to physicians as the source of care in the more restrictive states is not the explanation for interstate price differences.

b) In the study published in 1975, we made a direct comparison of the price of eyeglasses by source of care. This is shown in Table 5 and 6 of that study. The price of all providers tends to rise as the restrictions increase.

TO THE 23RD CROSS INTERROGATORY HE SAYS:

Yes. The first national sample, which was conducted before I became interested in this topic, had a heavy oversampling of individuals living in North Carolina. The second study published in 1975 did not. In our 1975 article, only 3.6% of the eyeglass price sample came from North Carolina. The exclusion of that state from the later article would not materially affect the conclusions drawn. It is noteworthy that North Carolina remained a high price state in the later study.

TO THE 24TH CROSS INTERROGATORY HE SAYS:

Yes.

TO THE 25TH CROSS INTERROGATORY HE SAYS:

Yes. It is worth pointing out that excluding data from some other states would have increased the observed differences. I found and I find no a priori reason for excluding North Carolina. More important, all the evidence which I have seen since that article was published strongly supports the proposition that the restrictive states have higher prices.

It is also worth pointing out that while North Carolina was overrepresented in that study, most of the severely restrictive states were underrepresented. Indeed, the most illuminating comparison in that earlier study could well have been the comparison of the prices in Texas and the District of Columbia with those in North Carolina. This is perhaps the best indication of what can happen to prices when we move from the relatively laissez faire environment at that time in Texas and the District of Columbia to the highly restrictive environment of North Carolina. The average price of eyeglasses in North Carolina was approximately 100% higher than in Texas and the District of Columbia.

TO THE 26TH CROSS INTERROGATORY HE SAYS:

a) The exclusion of New York would affect the conclusions concerning the importance of price advertising as compared to non-price advertising. The exclusion of New York would not affect the conclusions concerning the effects of advertising in general.

b) This is discussed on pages 349 and 350 of my paper published in 1972. New York did not permit price advertising in 1963 when the survey was undertaken. There are a priori reasons for concern about the appropriate classification of New York however. The argument about the effect of advertising is not that advertising per se reduces prices, but that advertising permits consumers to obtain information more readily, permits them to shop more efficiently, increases competition and through these mechanisms reduces prices. Anything which reduces the cost to consumers of obtaining information will have the effect of increasing competition. This is relevant for New York in that a substantial proportion of the population of New York lives in New York City and a substantial proportion of the sample in this study from New York state came from New York City. The high concentration of sellers located in a relatively small area there reduces the difficulty consumers have in obtaining price information and increases the incentives for providers to lower their prices. New Yorkers thus have cheaper substitutes for price advertising than most other citizens, and this situation is reflected in lower prices. This unusual situation in New York creates some difficulties in ascertaining the consequences of restricting price advertising since the limitation on price advertising in New York would have fewer consequences than in less dense locations.

A study of eyeglass prices in New York state which preceeded my own 1972 study alerted me to the

competitive nature of the high density market in New York City. This is noted in footnote 18 on page 346 of that study. That note states that, "Another recent study of prices charged for frames and lenses by optomtrists and by retail stores in New York showed substantially lower prices in the retail stores. The study also found that prices charged by optometrists were lower in an area with a high concentration of commercial firms (New York City) than in areas with a lower concentration of commercial firms."

My uncertainties about the representative nature of the New York City experience in terms of price advertising caused me to include the caveat in footnote 28 of that article.

TO THE 27TH CROSS INTERROGATORY HE SAYS:

Yes.

TO THE 28TH CROSS INTERROGATORY HE SAYS:

Yes, and those marketing professors whom I queried about the issue later indicated they had changed their opinion.

TO THE 29TH CROSS INTERROGATORY HE SAYS:

a) Yes.

b) The principal support for this study was provided by the University of Chicago which provides research facilities, some general support and salary support for its faculty members to undertake research of their own choosing. Part of the institutional support for the Center for Health Administration Studies which is part of the University of Chicago was provided by a grant from the Department of Health Education and Welfare to support research on the social and economic problems of

the medical sector. The Department of Health Education and Welfare provided the funding for the two national health surveys which were used in the two studies attached as well as in a wide variety of other research topics examined by other individuals.

There has been no research support provided to me by the commercial operators in this industry. I became interested in the question of interstate price differences originally when members of my family had to pay twice as much for eyeglasses in California as in Texas and obtained poorer service in California.

TO THE 30TH CROSS INTERROGATORY HE SAYS:

a) Difficult to say.

b) It will not always be possible to locate the non-trade name optometrist when an emergency arises. If this particular problem is perceived to be serious, then surely some direct remedy can be made so that the patients have a name and a number to call in case of emergency.

TO THE 31ST CROSS INTERROGATORY HE SAYS:

a) Yes, but with an important qualification.

b) I would guess that among people obtaining eyeglasses during a given time period, those who went to self-employed optometrists would know the specific name of the optometrist more frequently than those going to optometrist practicing under a trade name. However, the proportion of all persons in a state who obtain eyeglasses during a given time period is lower in the more restrictive states, where the associated higher prices lead them to obtain eyeglasses less frequently. I would guess that the proportion of all individuals in a state who know any source of eye care at all is lower in the more restrictive than in the less restrictive states.

TO THE 32ND CORSS INTERROGATORY HE SAYS:

No.

_____

LEE BENHAM

Sworn to and subscribed before me this___day of_____, 1976. My commission expires December 17, 1978.

_____

NOTARY PUBLIC

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

DR. N. JAY ROGERS	§	CIVIL ACTION NUMBER
VS.	§	
DR. E. RICHARD FRIEDMAN, DR. JOHN W. DAVIS, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR. AND DR. SALVADOR S. MORA	§	B-75-277-CA
	§	(THREE JUDGE COURT)
	§	
	§	

AFFIDAVIT OF STANLEY BOYSEN

My name is Stanley Boysen, I reside at 1611 Wethersfield Road, Austin, Travis County, Texas. I am the Executive Secretary of the Texas Optometric Association, and I have served in that position since 1964.

On June 8, 1967, the Board of Directors of the Texas Optometric Association adopted the "Provisional Membership Plan". This membership plan applied only to new members who were applying for membership in TOA. Such plan did not apply to the existing TOA members. A copy of that plan is attached. The plan is a recommendation of a TOA committee, and it was adopted by the Board at their June 1967 meeting.

On May 11, 1968, the Board of Directors of TOA adopted and instituted the "Practice Evaluation System". This applied to both new members and existing members of TOA. The "Practice Evaluation System" was an outgrowth and an enlargement of the 1967 "Provisional Membership Plan". The attached

article from the June 1968 TOA Journal outlined the provisions of the "Practice Evaluation System".

In the September, 1969, issue of the TOA Journal, Dr. Jerome McAllister wrote an article on the "Practice Evaluation System". He was mistaken in his dates when he stated that the "Practice Evaluation System" started on January 1,1970. This error is obvious from a reading of the 1968 TOA Journal article on the same subject.

The "Provisional Membership Plan" and the "Practice Evaluation Plan" were not drafted, adopted, or intended for the purpose of opening membership of TOA to commercial optometrists.

Neither the "Provisional Membership Plan" nor the "Practice Evaluation System" were a product or a result of the 1969 compromise legislation. They were not the result of any promises on behalf of TOA or any spokesman for TOA. To my knowledge, no member of TOA has ever promised anyone that the membership of TOA would by enlarged to encompass commercial optometry. Membership in TOA has been and continues to be limited to those who adhere to the professional standards set forth in the TOA rules of practice and the standards of the respective local optometric societies.

s/s

Stanley Boysen

STATE OF TEXAS §

COUNTY OF TRAVIS

Before me, the undersigned authority, a Notary Public in and for said county and state, on this day personally appeared STANLEY F. BOYSEN, known to me, who being duly sworn states on oath that the foregoing information is true and correct.

s/s
Stanley Boysen

SWORN TO AND SUBSCRIBED BEFORE ME, this the 8th day of October, 1976.

s/s
Notary Public,
Travis County, Texas

TO: ALL OFFICERS AND DIRECTORS OF THE TEXAS OPTOMETRIC ASSOC.

Greetings:

The Special Committee on Provisional Membership makes the following recommendations:

1. That the Officers and Directors of this Association be the body to stimulate and instigate interest among marginal non-members of TOA to become Provisional Members of TOA.

   a. The Board shall prepare a special membership application blank for such non-members. (Suggested sample enclosed).

   b. Representatives of the Board shall, in those societies areas that have approved the Provisional Membership and Practice Evaluation Plan at a regular meeting of the society and the TOA Board of Directors has been notified in writing of such approval, make personal contact by a visit with Provisional Member prospects, and after discussion, leave a Practice Evaluation form and membership application blank with him or her.

c. The Board shall receive such Membership applications directly through the Secretary of TOA. The Secretary shall immediately notify the President and the Board Members of receipt of such application.

d. At the instigation of the President the Board shall alone act and decide whether the applicant is sufficiently marginal in point requirements to warrant Provisional Membership status, or if applicant qualifies for direct consideration by a local society. If the applicant qualifies for Provisional Membership only, upon approval by the Board, his or her name shall be placed in a file separate from Active (or other) Memberships, so that notation can be made from time to time on his progress toward Active Membership eligibility.

e. Notification of such action by the Board on any given applicant shall be issued to the Secretary of the local society within which the applicant resides, if a local society exists in the residence area.

f. Accompanying such notification to the local society shall be a request that the local society co-operate in the effort by the Board to urge, assist, and aid such Provisional Member in improving his or her practice to the point that he or she may become qualified to apply for Active Membership. This shall include the inviting of the Provisional Member to attend regular local society meetings with full privileges except voting. Request should include the appointment of one (or more) of the society members to directly be responsible for visiting, observing and assisting the

Provisional Members every three months, and reporting in writing his appraisal to both the local society and the Board of Directors of TOA through the TOA President. (Three-months is an arbitrary time suggested).

g. The Board as a whole shall be kept informed on each Provisional Member's status by the President and Secretary each three months (three months arbitrary), by written reports in the absence of Board meetings.

h. A Practice Evaluation System (suggested form attached) shall be the guide by which a Provisional Member is judged both for qualifying as a Provisional Member and for his progress toward achieving Active Membership eligibility.

i. Upon achieving sufficient points within a three-year (or shorter) period on the Practice Evaluation System scale to qualify for Active Member eligibility, notification of this achievement, along with a detailed report of his or her progress history, shall be sent to the local society President and Secretary, with the request that the local society contact the Provisional Member and invite him or her to apply for local, state, and national optometric society membership. Simultaneously, notification, including congratulations and praise, shall be mailed to the Provisional Member by the President to the effect that he or she has reached the point that local and state society application for Active Membership can now and should be made, if a local society exists in his or her geographical area, for processing in the normal and customary manner. Such processing shall then be the responsibility of the local society.

2. Membership fees for the Provisional Member shall be set by the Board, taking into consideration the financial status of Provisional Members as a whole.

    a. The dues for Provisional Membership shall be the same as for regular active membership in TOA, unless altered, in special hardship cases, by action of the TOA Board of Directors.

    b. Provisional members would be eligible for the TOA Insurance Program, to receive all publications and mailings of TOA, to become a member of the TOA Credit Union and to receive all other benefits provided to Active Members including attendance at all meetings of the association with privileges of floor but cannot vote.

A period of three years as a Provisional Member shall be sufficient time to determine if a given Provisional Member is achieving toward the goal of Active Membership.

    a. Unless extenuating and excusable circumstances have interfered with said achievement, the Provisional Member shall be dropped from the rolls of TOA at the end of three years.

    b. Should such circumstances extenuate, a vote of two-thirds of the Board shall continue the Provisional Membership, if approved by the local society, for one more year.

    c. Before such a vote to extend is called for, the complete history of the Provisional Member must be reviewed.

4. Having instigated the solicitation of Provisional Memberships in TOA, the Board shall find it

incumbent upon itself to utilize every means at its command to carry through on each and every case on the Provisional Membership rolls toward a successful conclusion of the program.

a. If Practice Management training is required, provide it.

b. If post-graduate study to sharpen his or her optometric skills for greater proficiency is needed, arrangements could be made either through the University of Houston, or by means of training seminars manned by TOA members proficient in given methods and modalities.

c. Aid in office routines shall be made available if needed.

d. Public Relations knowledge shall also be made available.

5. If, by experience in the Program, changes in procedure are found necessary to enhance the program, careful study to the proposed changes shall be made before adoption.

   a. A Committee on Provisional Membership rules changes shall be appointed either from withn or without the Board by the President to perfect and recommend on such changes deemed advisable.

   b. Such changes shall be concurred in by the local societies, who have approved the program as provided in Section 1(b), after presentation by the Board.

6. A report shall be made annually to the TOA State Conventions assembled - in detail - numbers involved, precentage of those improving, etc. on all Provisional Members.

7. All-out effort shall be made by the Board to conclude this program within a reasonable length of time.

The attitude of the local society in which the Provisional Member resides regarding that member should at all times be taken into consideration by the Board.

Immediately upon adoption of the Provisional Member program, a Practice Evaluation System will be considered for adoption by TOA to apply to existing members of TOA. Such Practice Evaluation System could quite easily be a duplicate of the so-called "Colorado Point System", with whatever variations that may apply to the unique needs of TOA.

Your committee recommends the official names of this activity be:

1. Provisional Membership Plan
2. Texas Practice Evaluation System (instead of Point System).
3. Special Application Form for Provisional Membership. Later,
4. Texas Practice Evaluation System for Members of the Texas Optometric Association, Inc.

We, your Committee on Provisional Membership, present these proposals in the hope that further consolidation of membership in the Texas Optometric Association can be achieved. We hope, too, this may institute the beginning of a new era in optometric organization and co-operation.

Respectfully submitted,

Joe Wright, O.D.

Wes Pettey, O.D., Chairman

PRACTICE EVALUATION SYSTEM

No. 1. OFFICE LOCATION AND EXTERIOR APPEARANCE

25 points for professional location in office building, professional center or downstairs separate street location.
5 points for street location with public presentation as dispensing optician, with displays, signs, etc.
25 Maximum

No. 2. ADVERTISING OTHER THAN PROFESSIONAL CARDS OR LISTING

20 for no advertising
6 for no TV and Radio adv.
3 for no Newspaper adv.
2 for no Telephone dir. adv.
2 for no adv. in other directories or periodic Publications
20 Maximum

No. 3 DISPLAYS

15 for no displays
5 for no window display
3 for no frames from view of people in reception room
15 Maximum

No.4 SIGNS

20 for professional signs only
10 for no neon signs
5 for no oversize, garish signs from front and sides of office
20 Maximum

No. 5 PRACTICE IN YOUR NAME ONLY, AND NAME NOT USED IN CONJUNCTION WITH OPTICAL COMPANY, OPTICIANARY, OR DISPENSARY

10 points Maximum

No. 6 ATTENDANCE AT PROFESSIONAL MEETINGS

4 points for 4 local society or TOA meetings annually
6 points for one TOA approved educational meeting annually
10 points Maximum

Total possible points, 100.

Sixty points shall be sufficient to qualify an applicant to become a Provisional Member; however, he is required to achieve five additional points each year for a period of three years in order to become an Active Member.

Practice Evaluation System Adopted at TOA Convention

The following Practice Evaluation System, over a year in preparation, was adopted at the recent TOA Convention in Austin.

TO: THE OFFICERS AND DIRECTORS OF THE TEXAS OPTOMETRIC ASSOCIATION, INC.

The Special Committee on Membership Eligibility in the Texas Optometric Association, Inc. makes the following recommendations:

1. An optometrist licensed to practice optometry in the State of Texas shall be eligible to become an Active Member, or shall be eligible to continue a present Active Membership already held in the Texas Optometric Association, Inc., who can qualify according to the following Practice Evaluation System requirements, as interpreted by the official TOA Membership Committee in conjunction with the agreement of the TOA Board of Directors:

Practice Evaluation System

I. OFFICE LOCATION AND EXTERIOR APPEARANCE
- 25 points for professional location in office building, professional center, downstairs separate building or street location, or in conjunction with other professionals.
- 5 points for street location with public presentation as dispensing optician, with displays, unprofessional signs, etc.

____ ____ 25 Maximum

II. ADVERTISING (Professional Card or Listing Acceptable)
- 20 for no unprofessional media releases
- 6 for no TV and Radio advertising
- 3 for no Newspaper advertising
- 2 for no Telephone directory advertising
- 2 for no advertising in other directories or periodic publications

____ ____ 20 Maximum

III. DISPLAYS
- 15 for no displays
- 5 for no window display
- 3 for no frames in view of people in reception room

____ ____ 15 Maximum

IV. SIGNS
- 10 for professional signs only
- 5 for no neon signs
- 3 for no oversize, garish signs from front and sides of office

____ ____ 10 Maximum

V. PRACTICE IN YOUR NAME ONLY, AND NAME NOT USED IN CONJUNCTION WITH OR FOR OPTICAL COMPANY, OPTICIANRY, OR DISPENSARY

____ ____ 10 Maximum

VI. ATTENDANCE AT PROFESSIONAL MEETINGS
- 4 points for 4 local society or TOA meetings annually
- 6 points for one TOA approved educational meeting annually

____ ____ 10 Maximum

VII. MINIMUM STANDARDS FOR VISUAL EXAMINATION
- as promulgated by Texas State Board of Examiners, (1957)

____ ____ 10 Maximum

Total possible points, 100

2. A Minimum of 70 points shall be required in order for a member to maintain a present TOA Active Membership, or for a new applicant to qualify as an Active Member in TOA.
   a. Should the TOA member not qualify for Active membership with a total of 70 points, he shall be allowed a maximum of 24 months

from that date to achieve the 70 points without being removed from the TOA Active Membership rolls.

b. An applicant for new Active Membership in TOA not complying with the required 70 points shall be eligible to be automatically placed on the rolls of TOA as a Provisional Member, if the applicant desires such alternate membership, and achieves the required 60 points.

c. An already Active member of TOA not complying with the required 70 points on or after January 1, 1970, shall automatically be placed on the Provisional Membership rolls, if the member desires such alternate membership.

3. Local optometric societies shall use the above Practice Evaluation System in accepting an application for Active membership in a local society.

a. The local optometric society shall first be required to approve the application for Active Membership and then shall forward, along with its recommendation, the application for Active Membership and the P.E.S. form to Membership Committee and the Board of Directors of TOA for final approval or rejection.

4. In the absence of a local organized optometric society in the area of residence of an applicant, the applicant shall secure a membership application form along with a Practice Evaluation System form from the Secretary of the TOA, and, after having filled out both forms return both to the Secretary of TOA for direct approval or rejection of the application for Active Membership by the Board of Directors of TOA.

5. Beginning January 1, 1970, each member of TOA, or each applicant for membership in TOA, shall be required, in order to qualify to continue Active Membership or to apply for Active Membership, to achieve an additional 5 points each year for three years, to total 85 points by January 1, 1973, as judged by P.E.S., and iterpreted by the Board of Directors of TOA.

6. It shall be required that the Board of Directors of TOA shall by July 1, 1968 submit a Practice Evaluation System form to be filled out and returned to the Directors within ninety days of receipt in order to develop a Practice Evaluation System information record of every TOA member.

Respectfully submitted:
Joe Wright, O.D.
Weston A. Pettey, O.D., Chairman

[In the United States District Court
for the Eastern District of Texas]

DEPOSITION OF DR. E. RICHARD FRIEDMAN

[10]

Q. When did you enter the practice of optometry?

A. 1940.

Q. And you say that this battle has been raging since 1940?

A. Well, of course, I was not active. I was just really in practice and then I went into the service for four years, but yes, I would say that there had been -- the makings of it were beginning back then.

Q. Was there in fact a bill adopted in the 41st legislature that led to a further dispute within the profession?

A. I really don't know. That was before my time, before I was active. I was in the service in those days.

Q. Tell me what these two factions are?

A. The two factions are those that believe in optometry being practiced in a professional manner similar to medicine and dentistry and the other great professions, and those that think that optometry should be practiced in a not so professional plane.

Q. All right. Now, let's define for the moment the basic differences between the two. You represent a viewpoint, let's say, that is espoused by the TOA, is that correct?

A. I don't --

Q. You personally?

A. I wouldn't say that, no. I represent a viewpoint that is my own viewpoint. I don't espouse anybody's viewpoint, and I don't believe in espousing anybody's viewpoint.

Q. All right. Fine. Tell me the difference between the two viewpoints. You said that one of them is not so professional.

A. Well, I mean, elucidate. Just what --

Q. What do you mean by that?

A. Well, professional practice means proper doctor-patient relationship, ample time given to the seeing of a patient, no commercial aspects, no holding yourself out to do certain things different than others. This is what I mean. This is my idea of being a true profession.

Q. Let's just take these a step at a time. You said no commercial aspects. What do you mean by that?

A. Oh, I would say price advertising, window displays, blatant signs, things that are pretty well mentioned in our statute, that I mentioned as being prohibited in our statute.

Q. Window displays. That would be where frames and --

A. Frames and glasses in the doctor's windows, yes.

Q. What about, you said large signs; that would be a commercial type sign?

A. Neon, huge neon signs and such.

Q. What about newspaper advertising?

A. The same thing there, any blatant newspaper

advertisement. I think a professional cut such as a physician or a dentist uses is proper.

Q. What about trade names?

A. No, I don't think a professional should use a trade name.

Q. What other commercial aspects do you refer to?

A. That pretty well wraps it up, I think, outside of just the general practice. I do think that a large volume practice does not lend itself to proper doctor-patient care.

Q. As you discuss these five commercial aspects, aren't you -- you were here during the deposition of Dr. Mora.. Doesn't it all boil down to advertising in one form or another, whether it is a trade name, price, window displays, neon sign?

A. Well, that plus the actual patient care, yes.

Q. All right. Now, would you agree with me that whether I am a single practioner or associated with a hundred lawyers, that I can either handle a large volume or a small volume as, one, the demand, and two, my inclination permits?

A. No, sir.

Q. You do not?

A. No, sir.

Q. Well, let's just take the lawyer as an example. I can either --

A. I can't speak for a law practice. I can only speak for an optometric practice.

Q. Well, is it your opinion and are you testifying here that the single practitioner cannot handle a large volume?

A. Not -- it depends on what you mean by a large volume.

Q. Well, you used the term. I just accepted it.

A. I think a single practitioner can see one --two patients every -- he can see a patient every 45 minutes and do an adequate job, yes.

Q. Well, was that different from Dr. Mora and his practice?

A. I don't know Dr. Mora's practice. I don't know how he practices. I assume he practices professionally.

Q. Well, would that be any different from the man practicing in an office with Texas State Optical?

A. I really couldn't say.

Q. Can you tell me why there would be any difference?

A. Only if they are seeing more patients than can be properly given care.

Q. That would then depend largely upon the man and his professionalism, would it not?

A. I woud say so, yes.

Q. And it would be --

A. I would imagine that they have the right to see as many patients as they wish. I would hope so.

Q. All right. And so whether he was properly treating a patient would be more --

A. But that's what you are asking me, is this professionalism, and exactly what I think. If the man is seeing the proper number of -- giving patients proper care, this is professional.

Q. That's right, and that is one of the things that you are speaking to?

A. Yes.

Q. All right. Now, cutting through all of this conversation that you all have had through the years, at this point essentially there is no disagreement between you and Dr. Rogers as to the proper examination for refraction or prescription, is there?

A. No, sir, I don't think there is any disagreement.

Q. So whether a patient would come to your office or to Nate Roger's office, you would expect that he would get the same proper examinations or refraction and prescription?

A. I would expect and hope that he would.

Q. And you rather believe that's true, do you not?

A. I think in many instances it is, yes.

Q. But you all have had, and do have and apparently will continue to have, a substantial disagreement about, as Dr. Mora said, the mode of practice.

A. I think there is less disagreement today than there was a few years ago before the new Texas Optometry Act.

Q. And the mode of practice reates basically, does it not, to these five items that you mentioned: window displays, price ads, signs, newspaper ads, and trade name.

A. I believe that most optometrists today are in compliance with the statute, which is all I am saying they need to do as far as the Board is concerned.

Q. What about the ownership of multiple offices?

A. There is nothing in the statute about that.

Q. What is your viewpoints on the ownership of multiple offices?

A. I have no viewpoint one way or the other. I just believe that the statute should be compiled with.

Q. Do you own multiple offices?

A. I do not.

Q. Have you ever owned multiple offices?

A. Never have.

Q. Did the TOA introduce a bill in 1951 to eliminate multiple offices?

A. I really don't know.

Q. Is this one of the aspects of the code of ethics of the TOA that you shall not own multiple offices?

A. I'm not sure. Could be.

Q. We will come back to that.

A. Okay.

Q. Board Interpretation No. 8, the revised Board Interpretation No. 8, speaks to the use of what you might call para professionals, does it not, assistants?

A. I don't remember. I will have to --

MR. GREENHILL: Here.

A. Yes, yes, I remember this.

Q. Now, Board Interpretation No. 8 relates to assitants or para professionals.

A. Yes, sir.

Q. Taking histories and making certain -- taking certain steps in the examination process?

A. Yes.

Q. And one of the purposes of this is to better utilize the professional's time.

A. I would assume so, yes, sir.

Q. Well, isn't that --

A. It's to free him to perform duties to which he is more specially qualified.

Q. To which only he is --

A. Yes.

Q. -- trained and licensed?

A. Yes.

Q. And this Board Interpretation No. 8 and its implementation reduces the amount of time that the professional need spend with any particular patient?

A. Yes.

Q. And that would allow him to see more patients and render more patient service as a professional?

A. Yes.

Q. The 45 minutes that you speak about in this normal examination, does that include the frame styling and fitting?

A. No, sir.

Q. You are speaking now just the optometrist's --

A. Yes.

Q. -- patient examination?

A. Yes. I might mention that I personally do not use a para professional in my office. I take my own case history because I think it's extremely important, and the same with any acuities and all these things. I know that the Board has interpreted the statute to allow these things but does not mean that this is the way all optometrists need practice.

Q. And you voted for it if the records --

A. I was not on the Board at the time this was passed.

Q. It was adopted unanimously and it was adopted in January of '72 and you were not a member of the Board at that time?

A. No, sir.

Q. All right. You have been to the M.D. whose assistant has taken your case history.

A. Yes, sir, sure have.

Q. Now, when you spoke of the battles that took place in the legislature and the court, when did you begin participating in these battles?

A. Oh, I would guess somewhere in the late 1950s. I wouldn't say participating. I went down and lobbied with my own representative and state senator.

Q. As a member of TOA?

A. No, as my, as -- for my own self. I was a member of TOA.

Q. And what bill did you first speak to that you recall?

A. I really don't recall.

Q. What was the issue?

A. I don't know. I have been down so many times I just don't remember.

Q. All right. When you speak of cases in court, do you speak of any particular case?

A. Well, I am familiar with the cases that started -- I guess with the Kee-Baber case and then all from then on.

Q. And there has been numerous of those?

A. Yes, sir.

Q. You spoke of the governor's office. Has there been through the years quite a tussle with the various governors over appointments to the Board?

A. Well, I don't know that you would call it a tussle. I think that recommednations have been made to the governor from various sources.

Q. Including the TOA?

A. Yes, including the TOA.

Q. And has there been substantial dispute in the confirmation process of some Board members?

A. Yes, sir.

Q. Have you participated in that?

A. I have -- yes, I have. I have lobbied with my own legislators.

Q. Have you personally lobbied against the confirmation of Dr. Rogers and Dr. Mora?

A. Yes.

Q. When is the last time that you lobbied against the appointment and confirmation of Dr. Rogers?

A. It was before the new act.

Q. You did not personally speak to Governor Smith about the reappointment of Dr. Rogers to the present Board?

A. I did not.

Q. Do you know who did?

A. No, I don't.

Q. Have you heard it said that TOA spoke to Governor Smith and said, "Appoint anybody in Texas but Nate Rogers, and we will accept him"?

A. No, I don't know anything about that. I never heard that expression.

Q. Did you oppose the confirmation or, first, the appointment of Dr. Mora?

A. Before the act was passed there were several appointments -- I don't recall the names, but we all --

all of us who were opposed to it went down and lobbied against this.

Q. Did it include Dr. Mora?

A. Dr. Mora, Dr. Rogers, and two or three others that --

Q. Dr. Geller?

A. Dr. Geller.

Q. Dr. Shropshire?

A. Yes, I guess so. I had forgotten that he had been appointed. Yes, that's right. But after the act was passed I believe we agreed that there would be no more -- that that was part of the agreement, as I recall, that we would not block the confirmation.

Q. Now, was this lobby effort -- in oppostition to appointment or confirmation I am speaking right now -- was this just something that you did alone or was this done by a substantial number of members of TOA?

A. Oh, I guess 40 or 50 members of TOA.

Q. Dealing basically with their local representatives or someone they may have known?

A. Exclusively.

Q. And were some of these confirmations that you opposed, were they rejected -- specifically Dr. Geller and Dr. Shropshire?

A. I believe so.

Q. And Dr. Mora was concerned over your objection, as it were?

A. No, at that -- I believe we had an agreement at that time that there was no -- when he was confirmed then Dr. Rogers was confirmed, I believe there was an agreement. I am really not sure of the specific timing of that. It just slips my mind.

* * *

[55]

Q. Well, is there any advantage to the person enforcing the law if he is a member of TOA as opposed to --

A. No, sir.

Q. Are you, Richard Friedman, any more competent to enforce the law because you are a member of TOA than because you are not?

A. No, sir, not at all.

Q. Well, what is the rational relationship in your mind between a four-two majority in the interest of the people of Texas?

A. There is none. I have no rational relationship. I think any man that is on that Board, if he is sworn to uphold the law and to enforce the law, that is what he is there for, no matter what he belongs to.

Q. That is my question. What way does membership in TOA render you better able to serve than non-TOA members?

A. Not in any manner.

* * *

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Q. So your normal fee for eye examination leading to glasses would be $17.00?

A. Seventeen, and of course could be more, could be less. If we find that we need to do just a screening exam or something, why, it would be less but if I have to run certain tests, other tests, then it would be more.

Q. What tests would make it be more?

A. Oh, we might do tangent screen, might take some visual scales, and there are many other things that we might do in the office.

Q. If you take visual scales, what additional charge is assessed for that?

A. Five dollars. I take blood pressure in the office at times and charge $5.00 for that.

Q. Are there other tests that you have an additional charge for?

A. Not really. It depends. If the patient has been referred to me for some reason I might, for instance, do a slit lamp examination on them and I might charge just for that, depending on my time. I usually charge on a fee for services basis.

Q. Well, that is what I was asking.

A. Yes.

Q. What services generated what fees is what I am saying.

A. I had in our office, in every room in the office is posted a fee for all services and all materials.

Q. Would it be acceptable to Mr. Oliver if I asked you to mail a copy of that directly to the court reporter, and we would use it, attach it to your depostion?

A. I would be perfectly all right.

MR. KEITH: Let me give you Mrs. Looke's address directly. Is that agreeable with you, Robert?

MR. OLIVER: Sure.

Q. If you will do that, Dr. Friedman.

A. Okay.

Q. Now, your contact lens, you say, is $125.00 for the hard?

A. I think that's it, yes.

Q. All right. And then $175.00 is the total price to the patient.

A. I may be mistaken on that. We just recently went up on our fees and it seems to me that our total fee for two pair of contact lenses was $215.00. I believe that is right. Now we, as most of us, have had to raise our fees a little bit.

Q. Now, what about the examination for soft?

A. Examination for soft lens is $150.00, and the total fee is $300.00.

Q. What soft do you use?

A. We use the only two that are available, Bausch and Lomb and Hydrocurve.

Q. Do you have them available in your office?

A. Yes, sir.

* * *

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Q. Now, tell me about the $17.00. That's the examination fee?

A. Yes. If I have done a – I think I told you seventeen with the glaucoma test. It's seventeen without the glaucoma test. It would be another $40.00 if I did a glaucoma test.

Q. I was going to ask you that.

A. I was wrong in my earlier testimony.

Q. That's the sphygmometry?

A. I just -- I think better when I am writing.

Q. All right. And you perform that for persons over --

A. Thirty-five as a rule, unless I suspect some other reason to.

Q. Now, the $3.00 handling charge is for what?

A. It's for handling -- I really don't know what it is. It's something that we are permitted to charge our patients, our Medicaid patients, and when we -- they cut us back so we just add it on, so that's what it is, just handling of the material and frame.

* * *

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Q. All right. Now --

A. Ten dollars is -- actually the ten and three, you can combine those. It's $13.00 for services connected with the material.

Q. Services connected with the material?

A. Right. This has to do with the verification of the prescription when it comes back from the laboratory, the instructions to the patient on the care and handling of the lenses, the dispensing fee and whatever is taken care of in that. The $10.00 for the lenses is the closest to the nearest dollar of the pair of single vision lenses.

Q. Then the $5.00.

A. The $5.00 is the assumed cost of the frame.

Q. All right. Now, the first four items, that is, the $17.00 and the $13.00, those are common to each eye examination?

A. Yes. If I did not prescribe, I would cut it off there. That would be it.

Q. Would you charge $30.00 if you did not prescribe?

A. No.

Q. You would charge seventeen?

A. Seventeen.

Q. Okay. Now, the sphygmometry, blood pressure, visual fields, positive-negative accommodation --

A. Blood pressure -- no, not positive-negative accommodation, but blood pressure, visual fields, maybe some other things that are not included in the basic examination I would charge for. Just depending. I just charge for my services.

Q. All right.

A. If I have to do a complete muscle analysis, I might charge the patient for that.

Q. Now, let's take another -- let's take a bifocal.

A. Okay.

MR. KEITH: Will you read this to the court reporter and, Doctor, we will assume that I am asking the question?

DR. ROGERS: Plus one sphere upper. Plus one add, twenty-five bifocals, clear glass chemical-treated in combination metal-zyl frames.

A. All metal?

DR. ROGERS: No.

A. Talking about an AO?

DR. ROGERS: That's fine.

A. Again, I am not sure of the cost of the frame because I just don't recall. I am just assuming that it will be about $15.00. My fee, total fee, would be sixty-nine.

Q. All right. Now, again we would have the seven and the ten.

A. Well, you've got fourteen there because I am assuming that the patient is going to have sphygmometry; bifocal, he would probably be over 35.

Q. All right. seven, ten plus four?

A. Right.

Q. Plus ten for services.

A. Yes.

Q. Plus three for handling.

A. Thirteen dollars for services connected with materials, would be $34.00, and then the lenses, approximately $20.00; the frame, approximately fifteen, is thirty-five -- $69.00 total fee.

Q. Now, do you have a record of the number of persons you examine and do not prescribe for?

A. No.

Q. Is that a relatively small number?

A. I'm really not sure. I'm sure there are some every week like this, but I just couldn't tell you how many.

Q. Do you have any record of those that you refer to an MD for treatment?

A. We do keep a record of this so that we are sure that we get a report back from the MD. If we don't get it, we will call them and get it, but that's the only reason.

Q. Dr. Friedman, can you outline or state any disadvantages that you conceive of to there being responsible public members on the Texas Optometry Board?

A. I would have no objection.

Q. I understand that, but do you see any disadvantages to a public member?

A. No.

Q. Or members?

A. No, I do not. I think this is the trend and I think that one of these days there will be a public member on the Optometry Board as well as all boards.

Q. Do you see any disadvantages to persons who are merely dispensing opticians -- and I use that to distinguish, not to otherwise -- being on the Board?

A. Well, I would have to think about that one. I really never have given it any consideration in my mind. I would rather pass that one.

Q. Do any come to mind at this point?

A. No, I can't think of any, but I don't want to say that I would not have any objection to that.

Q. Has the factionalism that has pervaded the profession in Texas since 1945, let us say, is it fair to say that it has occurred in the legislature and the courts, in the governor's office, in the administrative agencies, and it has been both legal and political?

A. I would like to say that all parties involved in this so-called factionalism have had access to their day in court, day in the legislature and so forth, and that nobody has been denied any right to go anywhere to do anything to appeal their case.

Q. Well, my question was, has this factionalism occurred in each of these forums?

A. There has been, I guess you could say factionalism in all of these forums, yes, which I think is perfectly proper.

Q. And it has taken the legal form and also the so-called political form?

A. Yes, sir, I believe that's the democratic way.

Q. And it has been represented by a number of so-called four to two votes on the Optometry Board, has it not?

A. I like to think that the four-two votes represent the opinion of various Board members as to the way they interpret the statute.

Q. Has there been in your experience any four-two vote that has not followed along the lines of TOA-non-TOA?

A. I don't -- no, I wouldn't be surprised, but I'm not sure. I haven't kept track of the various votes and who voted how.

Q. Are you aware of any?

A. That are not? I am not. At this moment I am not aware. I couldn't name any, no.

Q. Can you cite any issue where there has been a four-two vote other than TOA-non-TOA?

A. Oh, I can't cite any issue one way or the other but I believe that the various -- the two groups, as you put them, have split their vote in some instances in some matters in many ways, many times. I don't think that every vote is on a four and two basis or on the basis of the association that they might belong to.

Q. There have been many unanimous votes?

A. Beg your pardon?

Q. There have been many unanimous votes?

A. Many unanimous votes, many four and one votes, many abstentions, many present and not voting, and it happens in every -- in practically every Board meeting where one or two people will disagree and not necessarily because they are a member of any group. The votes are very much -- very often mixed.

* * *

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Q. Or an optometrist might refer a patient to a dispensing optician. That referral system conflicts, does it not, with the mode of your practice or the mode of practice of that of the TOA members?

A. I don't think so.

Q. Do you refer patients to a dispensing optician?

A. Only if the patient asks me to.

Q. When you have completed your eye examination and written a prescription, what do you next state to the patient?

A. If you are asking me if I give the patient a choice -- this is what the law says we are supposed to do -- I must admit I am remiss. I do not.

Q. What do you normally say to the patient?

A. I just say, "Do you want me to fill your prescription?"

Q. Or "Have a seat here and --"

A. "If you do, I will take you up to -- and we will let my frame stylist show you the frames."

Q. Do you believe that is the customary way it is handled by the optometrists who also have an opticianry within his establishment?

A. I wouldn't say he has an opticianry. He is dispensing to his own patients in his own office.

Q. Okay. By a man who is dispensing to his own patients.

A. I would say that most optometrists do, but I really can't speak for them. This section of the Act, as you know, is very confusing, and I don't think the Board has ever taken any action on it, has never asked for an opinion on it that I know of. I believe -- I am not even sure whether there has been a fact situation written on it. I don't recall one.

Q. By "fact situation" you mean to submit that --

A. To Mr. Greenhill.

Q. --to Mr. Greenhill for one of these --

A. Yes, so I really can't -- as far as I am concerned, I do not understand the section too well and I -- until we have it clarified by the Board, I really don't know what to do.

Q. Well, could you tell the patient he has two choices: he can have you do it or he can go elsewhere?

A. Not really. I don't think very many optometrists are doing that.

Q. What number of patients do you recall referring to a dispensing optician in the year 1975?

A. I couldn't tell you but it was very small. Many patients will ask me for their prescription. This is becoming more and more frequent in my office. And I can't tell you how many but this is -- and I don't refer them to any particular one. Usually, they have somebody in mind. They may go to Texas State or anyplace.

Q. Then do you tell them to come back?

A. For an optimetrical examination, always, yes.

Q. And do you still charge on the same basis, $30.00?

A. No, no. If I give them a prescription, I will charge them $5.00 to write the prescription and to verify it when they come back to me. So it's seventeen plus five.

Q. When do you charge the plus five, on their return?

A. No, no. When they leave the office and I tell them that they are paying for my verification on that prescription and that I expect them to bring it back to me to be sure it is like I wanted it.

Q. Do you agree that this Section 515-E that we are talking about treats different optometrists differently?

A. I don't know what it does. I am not going to say that because I don't know, and I believe if we are going to -- if the Board is going to act on that section, which I assume we will have to when we get a complaint or something, we are going to have to take some action, we are going to have to ask for a clarification by attorneys unless Dr. Rogers prevails in the meantime.

* * *

[In the United States District Court
for the Eastern District of Texas]

DEPOSITION OF DR. N.J. ROGERS
(Taken January 13, 1976)

[75]

Q. Yes. We are limiting it to legislative pressure. We will get to --

A. A couple of things. One, in the nineteen sixties -- I don't recall what year, but there was a bill, another bill. Let's see. It was about 1963, I believe. There was a bill in the legislature, but to be frank, I can't remember some of the provisions of it.

Q. What did it roughly deal with?

A. I just don't remember what -- I remember the 1951 bill, but this was -- wait a minute. I think it had to do with the licensing of dispensing opticians. I believe that's what it was because I opposed it. TOA was in favor of that bill, and I opposed it. I spoke against it. That happened in the early sixties. I know it happened after the Dallas case in 1959, and because of what took place at that hearing, I made reference to the Dallas case. Now, this was in the legislature.

Q. What did they do, simply the TOA was for it and you were against it?

A. Sponsoring this legislation, supporting it.

Q. And you didn't want opticians to be licensed?

A. I was opposed to the licensing of dispensing opticians, both the independent dispensing opticians as well as the dispensing opticians that worked --

Q. For you?

A. Us or others in optometric offices or in ophthalmologists offices.

Q. You were opposed to it because it might be unduly restrictive on your people. Is that basically the reason?

A. No, that wasn't it. I just didn't feel that there was any basic need for it from the standpoint of the protection to the public.

Q. Now, after 1960 what happened?

A. This one I just made reference to was in the early sixties. I don't know whether it was '63 or '5, whichever year. Then during Governor Connally's term as Governor, we had another very bad situation regarding a fight on confirmations of State Board appointments by Governor Connally; namely, Dr. Geller, G-e-l-l-e-r, and Dr. Shropshire, S-h-r-o-p-s-h-i-r-e. Those appointments were defeated, TOA was successful in preventing confirmation of these men who were not – these two men were not members of TOA.

Q. Dr. Shropshire worked for Lee Optical, didn't he?

A. Yes.

Q. And Dr. Geller worked for whom?

A. He had his own offices in El Paso. Then subsequent to that there was another – call it a fight against some confirmations of some other appointments to the Board by Governor Connally, and Dr. Cohen of Longview was one of those who was not confirmed at that time.

Q. What about Dr. Mora?

A. Dr. Mora was confirmed, and I don't recall whether it was at the same time as these others or not. There were others that were up for confirmation when Dr. Mora was up, but I can't recall which ones, whether it was Geller and Shropshire or whether it was Cohen and Mora. I just don't recall, but there was this fight.

Q. And you were supporting these people, and Texas Optometric people were opposing their confirmation in the Texas Senate?

A. Yes.

Q. And they won with regard to those appointments?

A. They defeated these confirmations except Dr. Mora's.

Q. Dr. Mora got appointed?

A. He was confirmed.

Q. So you got one out of the four?

A. Well, I don't know what you mean I got one out of the four. One of those four were confirmed.

Q. You were supporting all four?

A. Yes.

Q. And three of them were defeated and one was appointed, so you got one out of four.

A. One of the four was confirmed, that's right. Only one of the four.

Q. And you were supporting all four of them?

A. Yes. Now, that has to do with the legislature.

Q. That is all that has to do with the legislature?

A. Then, of course, the 1969 bill that was introduced.

Q. What happened with regard to the legislative pressure against you with regard to the 1969 bill?

A. The TOA -- I can't be sure whether they introduced the bill. Let me think. I don't know whether they went to Governor Preston Smith after they introduced the bill or before, but there was a bill introduced -- not by me or by my associates of the people that practice in the manner that we did. Governor Smith in view of the problem on the State Board appointments and the inability to get appointees confirmed, which left the State Board inoperative for several years because during the time that two of the members were appointed and were serving during the interim between sessions, they were legally entitled to serve as Board members. The membership was three non-TOA members and two TOA members, but the TOA members refused to meet with us. These appointments were made by Governor Connally, and they absolutely refused to meet because they did not have the majority of members of the Board. The Board was unable to give State Board examinations for a period of almost two years. There was always a threat that whoever might be appointed in the future could not be confirmed because of the fighting between these two groups.

Q. What was the makeup? Who were they?

A. Dr. Shropshire was one.

Q. And you?

A. And Dr. Geller and I.

Q. You all were the three non-TOA members?

A. Non-TOA.

Q. Who were the others?

A. One was Dr. Gill and Dr. Woods, Ira Woods.

Q. And you all couldn't get anything done?

A. The refused to meet because they did not have the majority control.

MR. KEITH: Which defeated a quorum.

* * *

[102]

Q. Well, would you say that if four members of the Texas Optometry Board were in the Kiwanis Club, that the Kiwanis Club would have the control over the Optometry Board?

A. No, because the Kiwanis Club would have no economic interest in the practice of optometry; whereas, the four TOA members of that Board have a very strong and distinct economic interest, which has been established. The facts have been established down through the years. This is the difference, the fact they are members of TOA, and the law -- and they have wanted this provision in the statute that they have control of that Board, and because there is the competitive factor and the two factions in optometry, in Texas as well as other states, but we won't go into that because it is nationwide, and because there is this economic fight and has been, this economic fight between these two

factions, the TOA group and the non-TOA down through the years, this is why they started -- full control. It's an economic control.

Q. Are you in competition as far as optometry goes with any of the present Board members?

A. Yes.

* * *

CODE of ETHICS

and

SUPPLEMENTS

RULES of PRACTICE

American Optometric Association
7000 Chippewa Street
St. Louis, Missouri 63119

DX-25

The Code of Ethics of the American Optometric Association sets forth briefly certain basic duties of its members, and it reaffirms the benevolent and humane fundamental purpose of the profession of optometry: To protect and conserve and improve human vision.

CODE of ETHICS

It Shall Be the Ideal, the Resolve, and the Duty of the Members of the American Optometric Association:

TO KEEP the visual welfare of the patient uppermost at all times;

TO PROMOTE in every possible way, in collaboration with the Association, better care of the visual needs of mankind;

TO ENHANCE continuously their educational and technical proficiency to the end that their patients shall receive the benefits of all acknowledged improvements in visual care;

TO SEE THAT no person shall lack for visual care, regardless of his financial status;

TO ADVISE the patient whenever consultation with an optometric colleague or reference for other professional care seems advisable;

TO HOLD in professional confidence all information concerning a patient and to use such data only for the benefit of the patient;

TO CONDUCT themselves as exemplary citizens;

TO MAINTAIN their offices and their practices in keeping with professional standards;

TO PROMOTE and maintain cordial and unselfish relationships with members of their own profession and of other professions for the exchange of information to the advantage of mankind.

Adopted by the House of Delegates of the American Optometric Association, at Detroit, Michigan, June 28, 1944.

SUPPLEMENTS

I. BASIC RESPONSIBILITIES OF AN OPTOMETRIST

Section A. THE WELFARE OF HUMANITY

A profession has its prime object the service it can render to humanity; reward or financial gain should be a subordinate consideration. The practice of optometry is a profession. In choosing this profession an individual assumes an obligation to conduct himself in accord with its ideals.

Section B. SELF- IMPROVEMENT

It is the duty of every optometrist to keep himself in touch with every modern development in his profession, to enhance his knowledge and proficiency by the adoption of modern methods and scientific concepts of proven worth, and to contribute his share to the general knowledge and advancement of his profession by all means in his power. All these things he should do with that freedom of action and thought that provides first for the welfare of the public within the scope and limits of his endeavor.

Section C. SCIENTIFIC ATTITUDE

An optometrist should approach all situations with a scientific attitude, weighing all that is new against the

present fund of knowledge and his experience, and accepting only that which is truth as nearly as he can ascertain.

Section D. PERSONAL DEPORTMENT

An optometrist should be an upright man. Consequently he must keep himself pur[illegible] character, must conform to a high standard of morals, and must be diligent and conscientious in his studies.

Section E. OPTMETRISTS AS PUBLIC CITIZENS

Section E. OPTOMETRISTS AS PUBLIC CITIZENS

An optometrist should bear his full part in supporting the laws of the community and sustaining the institutions that advance the interests of humanity.

SUPPLEMENTS

I. BASIC RESPONSIBILITIES OF AN OPTOMETRIST

Section A. THE WELFARE OF HUMANITY

A profession has for its prime object the service it can

II. RELATIONS BETWEEN AN OPTOMETRIST AND HIS PATIENTS

Section A. CONFIDENTIAL ASPECTS OF PATIENT RELATIONS

Patience and delicacy should characterize all the acts of an optometrist. The confidence concerning individual or domestic life entrusted by a patient to an optometrist and the defects of disposition or flaws of character observed in patients during attendance should be held as a trust and should never be revealed except when imperativly required by the laws of the state.

Section B. THE PRESENCE OF A PATHOLOGICAL CONDITION SHOULD BE COMMUNICATED BY AN OPTOMETRIST TO HIS PATIENT

An optometrist should give to the patient a timely notice of manifestations of disease. He should neither exaggerate nor minimize the gravity of the patient's condition. He should assure himself that the patient or his family has such knowledge of the patient's condition as will serve the best interests of the patient.

Section C. PATIENTS MUST NOT BE NEGLECTED

An optometrist is free to choose whom he will serve. He should respond to any request for his assistance in an emergency. Once having undertaken a case formally, an optometrist shall not abandon or neglect the patient. Frequently the immediate, prior need of the patient for the professional services of another must be recommended by the optometrist. In any event, he shall not withdraw from a case until a sufficient notice has been given the patient or his family to make it possible to secure other professional services.

Section D. COMPENSATIONS AND FEES

The fee charged the patient is determined by the skill, knowledge, and responsibility of the optometrist. Additional factors are the time and overhead costs, and the relative value of the service given.

Section E. THE RELATIONS OF SERVICES AND MATERIALS

Materials utilized by the optometrist are charged to the patient on the basis of their costs to the optometrist.

Section F. GRATUITOUS SERVICE

The poverty of a patient and the humanitarian, professioanl obligations of optometrists should command the gratuitous services of an optometrist. Other individuals and endowed institutions and organizations have no claim on the optometrist for gratuitous services.

Section G. CONTRACT PRACTICE

It is unethical for optometrists to enter into contracts which impose conditions that make it impossible to deal fairly with the public or fellow practitioners in the locality.

Section H INTERFERENCE OF UNRELATED PRACTICES

The acts which an optometrist performs and which are outside the confines of his profession must not mislead the public as to the scope of this profession, and must not be inimical to the public welfare or to that of his fellow practitioners.

III.RESPONSIBILITIES TO OTHER OPTOMETRISTS AND TO THE PUBLIC

Section A. UPHOLD THE HONOR OF THE PROFESSION

The obligation assumed upon entering the profession requires the optometrist to comport himself as a gentleman, and demands that he use every honorable means to uphold the dignity and honor of his vocation, to exalt its standards and to extend its sphere of usefulness.

Section B. OPTOMETRIC SOCIETIES

In order that the dignity and honor of the optometric profession may be upheld, its standards exalted, its sphere of usefulness extended, and the advancement of optometric science promoted, an optometrist should associate himself with optometric societies. He should contribute his time, energy, and means to the end that these societies may represent the ideals of the profession.

Section C. ADVERTISING

The following are deemed, among others to be unethical and to constitute unprofessional conduct in accordance with the laws and regulations of each particular state.

Soliciting patients directly or indirectly, individually or collectively through the guise of groups, institutions, or organizations.

Employing solicitors, publicity agents, entertainers, lecturers, or any mechanical or electronic, visual or auditory device for the solicitation of patronage.

Advertising professional superiority, or the performance of professional services in a superior manner.

Any advertising or conduct of a character tending to deceive or mislead the public.

Advertising one or more types of service to imply superiority or lower fees.

Holding one's self forth to the public under the name of any corporation, company, institution, clinic, association, parlor, or any other name than the name of the optometrist.

Holding one's self forth as possessed of, or utilizing exclusive methods of practice or peculiar styles of service.

Displaying certificates, diplomas, or similar documents unless the same have been earned by the optometist.

Guaranteeing or warranting the results of professional services.

Advertising of any character which includes or contains any fee whatsoever, or any reference thereto, or any reference to the cost to the patient, whether related to that examination or the cost or fee for lenses, glasses, frames, mountings, or any other optometric services, article, or device necessary for the patient.

Offering free examination or other gratuitous services, bonuses, premiums, discounts, or any other inducements.

Permitting the display of his name in any city, commercial, telephone, or other public directory; or directory in the lobby of public halls in any office or public building, using any type which is in any way different from the standard size, shape, or color of the type regularly used in such medium.

Permitting his name to be put in any public directory under a heading other than "Optometrist."

Printing professional cards, billheads, letterheads and stationery with illustrations or printed materials other than his name, title, address, telephone number, office hours, and specialty, if any.

Displaying large, glaring or flickering signs, or any sign or other depiction containing as a part thereof the

representation of an eye, eyeglasses, spectacles, or any portion of the human head.

Using large lettering or other devices or unusual depictions upon the office doors or windows.

Section D. PATENTS

It is unprofessional for an optometrist to exploit a patent for lenses, appliances, or instruments used in the practice of optometry in such a way as to deprive the public of its benefits, either through refusal to grant licenses to competent manufacturers who can assure adequate production and unimpeachable quality, or through exorbitant demands in the form of royalty; or for similar forms of monopolistic control in which the interests of the public are exploited.

Section E. REBATES

It is unprofessional and unethical to accept rebates on prescriptions, lenses, or optical appliances used in the practice of optometry.

Section F. SAFEGUARDING THE PROFESSION

An optometrist should expose without fear or favor, before the proper optometric tribunals, corrupt or dishones conduct of members of the profession. All questions affecting the professional reputation or standing of a member or members of the optometric profession should be considered only before proper optometric tribuanls in executive sessions, or by special or duly appointed committees on ethical relations. Every optometrist should aid in safeguarding the profession against the admission to its ranks of those who are unfit or unqualified because deficient either in moral character or education.

Section G. PROFESSIONAL SERVICES OF OPTOMETRISTS TO EACH OTHER

An optometrist should always cheerfully and gratuitously respond with his professional services to the call of any optometrist practicing in his vicinity, or of the immediate family dependents of optometrists.

SectionH. CONSULTATIONS OF OPTOMETRIST SHOULD BE ENCOURAGED

In doubtful or difficult conditions where the services of another may be required, the optometrist should request consultations.

Section I. CONSULTANT AND ATTENDANT

When an optometrist has been called on a case as a consultant, it is his responsibility to insure that the patient be returned to the original optometrists for any subsequent care that the patient requires.

Section J. CRITICISM TO BE AVOIDED IN CONSULTATION

The optometrists, inhis relations with a patient under the care of another optometrist, should observe the strictest caution and reserve; should give no derogatory hints relative to the nature and care of the patient's disorder; nor should the course of conduct of the optometrist directly or indirectly tend to diminish the trust reposed in the attending opotmetrist. In embarrassing situations or wherever there may seem to be a possibility of misunderstanding with a colleague, the optometrist should always seek a personal interview with his fellow.

Section K. GENERAL PRACTITIONER RESPONSIBLE

When the general practitioner of optometry refers a patient to another optometrist, the former remains in charge of the case and is responsible for the care of the patient until properly dismissed.

Section L. SERVICES TO PATIENT OF ANOTHER OPTOMETRIST

An optometrist should never take charge of, or prescribe for, a patient who is under the care of another optometrist, except in an emergency, until after the other optometrist has relinquished the case or has been properly dismissed.

Section M. CRITICISM OF A COLLEAGUE TO BE AVOIDED

When an optometrist succeeds another optometrist in the charge of a case, he should not make comments on, or insinuations regarding the practice of the one who preceded him. Such comments or insinuations tend to lower the esteem of the patient for the optometric profession and so react against the critic.

Section N. A COLLEAGUE'S PATIENT

When an optometrist is requested by a colleague to care for a patient during his temporary absence; or when, because of an emergency, he is asked to see a patient of a colleague, the optometrist should treat the patient in the same manner and with the same delicacy as he would have one of his own patients cared for under similar circumstances. The patient should be returned to the care of the attending optometrist as soon as possible.

Section O. ARBITRATION OF DIFFERENCES BETWEEN OPTOMETRISTS

Should there arise between optometrists a difference of opinion which cannot be properly adjusted, the dispute should be referred for arbitration to an appropriate committee of impartial optometrists.

Section P. FEE SPLITTING

When a patient is referred by one optometrist to another for consultation or for care, whether the optometrist in charge accompanies the patient or not, it is unethical to give or receive a commission or secret division of fees, by whatever term it may be called or under any guise or pretext whatsoever.

Section Q. OFFICIAL POSITION

A member holding an official position in any optometric organization shall avoid any semblance of using this position for self-aggrandizement.

IV. RELATIONS BETWEEN AN OPTOMETRIST AND OTHER PROFESSIONALS

Section A. INTERPROFESSIONAL RELATIONS

Dignity, propriety and a proper regard for their individual fields of service must characterize the relationship between optometrists and members of other professions.

Section B REFERRING PATIENTS

Whenever, to complement the services of an optometrist, the patient's condition requires the professional services of another, every cooperative

effort shall be made to the end that the patient's welfare be safeguarded.

Section C. PUBLIC HEALTH

Professional responsibility demands that the optometrist actively participate in public health measures to the end that every step be taken to safeguard the welfare of society.

Adopted 1946, revised 1968, 1970.

AOA RULES OF PRACTICE

A. MEMBERS SHALL abide by the Constitution and By-Laws, Code of Ethics and its Supplements, and Rules of Practice of their national, state, and local optometric organizations.

B. MEMBERS SHALL practice in such location and manner as is customary with other health care professionals in the area.

C. MEMBERS SHALL maintain their offices so that the physical appearance is similar to that customary with other health care professionals in the area:

Signs shall be unpretentious, limited to four inch letters at street level, seven inches above. Ophthalmic materials and certificates shall be visible only from within.

D. MEMBERS SHALL present themselves to the public in a manner similar to that customary with other health professionals in the area:

Telephone and other directory listings shall be in ordinary type size. Announcements shall be limited in size to two columns by two inches, and limited in context to name, profession, address, telephone number, office hours, and practice limited to. . . .

Passed unanimously by the A.O.A. House of Delegates, June 29, 1968.

Enforcement of the provisions of the Rules of Practice shall be the duty of the various state associations. It is recommended that when a member is doubtful of the ethics or advisability of any action he contemplates, he shall submit a detailed statement to the proper committee of his state association for its consideration.

Optometry's Premise

A PROGRAM of long range planning must necessarily be based upon a set of goals tha the profession may justly expect to reach within the foreseeable future. Such professional goals are anticipated in some degree by the present stage of development in the profession, by a consideration of what the immediate future will probably bring forth, and by a knowledge of presently existing educational programs and scientific clinical developments.

IN ITS PROGRAM, optometry must fill the needs of a highly technical age in which the visual requirements of all peoples are becoming increasingly important and significant. In this, optometry can serve through its own research, but even more through the clinical contributions of optometrists in practice.

OPTOMETRY PERFORMS a unique and distinct vision care service. Competence in optometry is gained by formal education as well as by example, precept, demonstration and extensive clinical experience under competent teachers at institutions of higher learning and by continuous programs of postgraduate education.

THE PROFESSION of optometry, with a thorough education in physiological, psychological, mechanical, physical and geometrical optics, in addition to a broad

foundation in other sciences such as physiology, anatomy and pathology, provides its practitioners with a complete and thoroughly rounded preparation for the vision care of mankind.

THIS FUNDAMENTAL TRAINING, with emphasis on the psycho-physiology of vision, underlies modern optometry's concept and practice of functional vision care. In addition to good acuity, optometry is dedicated to the practice of preventive optometry, as well as to the comford and efficiency of the patient's vision.

THE TREATMENT of pathological conditions and eye surgery is acknowledged by optometry to be in the field of medicine. However, for the protection of the public, and in order to make proper referrals to other practitioners and specialists, optometrists must continue to be well trained in the detection and recognition of ocular signs of pathology.

OPTOMETRY, specializing in vision care, will maintain itself as a completely separate and independent profession in the general field of health care. It will continue to work in close cooperation and professional collaboration with the other health care professions, as well as with education, psychology, sociology and other related disciplines.

THE PATIENT'S BEST INTERESTS must remain paramount at all times. To that end optometry will extend its research and development in the general field of vision in order that the patient and public will be best served.

-Adopted by the House of Delegates of the American Optometric Association, at Dallas, Texas, July 1, 1959.

DX-26

Article XIV
Code of Practice

Section 1. The following rules shall serve as a guide for the professional conduct of the members of this Association, and any violation of these rules shall be considered unethical practice.

1. No member shall willfully violate the Texas Optometry law or the rulings of the Texas Optometry Board.

2. No member shall practice in or on premises where any materials other than those necessary to render his professional services are dispensed to the public.

3. No member shall use the Doctor title other than as specified in the Texas Healing Arts Identification Act.

4. No member actively engaged in the practice of optometry shall in any manner publicize or hold himself forth as an optician.

5. No member shall display his license, diplomas, or certificates in such manner as to be seen and read from outside his office.

6. No member shall hold himself forth in such a way as to carry the slightest intimation of having superior qualifications or being superior to other members of this Association.

7. No member holding an official position in any optometric organization shall use such position for self-aggrandizement.

8. No member shall display any sign containing other than his or her name, profession, and office hours; same

to be used only on office windows or at entrance to his office. Letters must not be luminous or illuminated and must not be more than 4" in height for street level and 7" in height for offices above the street level.

9. No member shall display eyeglass signs or painted or decalcomania eyes anywhere.

10. No member shall use other than his professional card on or in any publication or in any public display. Said card shall not contain any more than his or her name, profession, address, telephone number, office hours, "eye examination by appointment" or "practice limited to _____" (any optometric specialties). Special announcements such as office openings, absences, or removals may be used when timely. Educational material may be published only when it has been specifically approved by the board of directors of this Associaiton.

11. No member shall use bold-face type or in any other manner attempt to attract special attention to himself in any telephone or other public directory.

12. No member shall display any merchandise, ophthalmic material or advertising of any kind in windows or in any room of his office for the purpose of inducing patronage.

13. No member shall do anyting inconsistent with professional standards of the optometric and allied health professions.

14. All members shall conform to the code of ethics and rules of practice of the American Optometric Association.

15. No member of this Association shall own, lease or operate optometric practices in more than three separate locations.

16. No member shall, in the judgment of the member's local society, have a direct or indirect arrangement with any optician so as to have the practical effect of solicitation by the optician for the member, the practical effect of advertising by the optician for the member, or the practical effect of control by the optician over the member.

The member shall furnish any information or documentary evidence requested by the local society for purposes of making such determination. Failure to furnish such information shall constitute an automatic forfeiture of the member's goods standing in the local society.

17. This code of practice shall become effective immediately after adoption and board of directors of this Association shall be empowered to grant extension of time in cases of hardship which are presented for its consideration.

[In the United States District Court
for the Eastern District of Texas]

DEPOSITION OF DR. N. JAY ROGERS
(Taken April 6, 1976)

[118]

Q. All right. When you took the oath of office did you take what we call the so-called Constitutional Oath of Office that is described in Article 16, Section II? I will just hand it to you and ask you to read it and tell me whether or not you took such an oath?

A. Yes, I did.

Q. To the best of your capacity have you attempted to uphold and execute faithfully that oath of office?

A. Yes, I have.

Q. Within the practice of optometry, the evidence in this case shows there are two factions. Is that a correct analysis?

A. I would say that that is one way to express it, two factions.

Q. What do those factions represent or what do they divide with respect to?

A. Well, the factions are separated by what we would term the mode of practice, mode of practice of optometry.

Q. Is patient care involved?

A. No.

Q. The proper diagnosis or the proper prescription?

A. No, sir.

Q. Is it purely economic in its manisfestation?

A. I would say yes.

Q. That is the factionalism?

A. Yes.

Q. What are the two factions that dominate the practice within the state of Texas?

A. Well, the one group, the so-called for simplicity of reference, the so-called professional group is the Texas Optometric Association known as TOA, and the other group, which are not affiliated with the Texas Optometric Association, or generally referred to as the commercial practioner.

Q. Is this concept of professional and commercial optometry limited purely to the state of Texas?

A. No, it is nationwide, more or less.

Q. In your experience as a member of this profession for nigh on to forty years, what is the national association that is the counterpart of the Texas Optometric Association?

A. The American Optometric Association.

Q. Does it have, in your experience, affiliated state associations?

A. Yes.

Q. Nationwide?

A. Yes, in each of the fifty states.

Q. What is the TOA?

A. TOA is a professional association, and it is composed of members that adhere to the rules and the rules of practice of the association, of the TOA.

Q. In your experience in having dealt with this matter over the last forty years, what in your experience does TOA stand for?

A. Well, it stands for a certain type of outward appearance in the practice of optometry, and that is, they wish to appear on a more so-called professional appearance similar to the dentists, the lawyers, the medical doctors, and they simply want to hold themselves out in what would appear to be a more professional type, less commercial type of practice by the general physical appearance of their offices.

Q. Does this appearance, professionalism, result in any different quality of service to the consuming public?

A. No.

Q. Does it result in any -- that is the appearance of professionalism, does it result in any fee structure?

A. Yes.

Q. To the public?

A. Yes.

Q. What is the difference in the fee structure between the commercial and the so-called professional or TOA associated optometrists?

A. The basic difference is that the so-called professional optometrists, the members of the TOA, have a fee system or fee structure where they break down their services and their service fees such as examination fees, technical fees, reevaluation fees,

and there are several others to where the fee to the patient, to the public for the examination and the allied services that are part of the prices of optometry are much higher than the fees for that same service that the commercial optometrists charge. For example, the examination fee of the professional optometrist ranges anywhere from fifteen or eighteen dollars even up to as high as thirty-five or more for the examination aspect of it. So the professional optometrists derive a great portion of their net profit or their profit from the patient in the form or guides of professional fees.

Q. How would that fifteen to thirty-five dollars compare to the customary fee for an examination performed by a commercial optometrist?

A. It's much higher than the average commercial optometrist.

Q. What fees for examination are charged by the Texas State Optical at this time?

A. Well, generally ten dollars for the examination, and in some instances they are twelve dollars, and in one or two they might be a little higher, depending on the office.

Q. You said in some instances there is one charge in Texas State Optical, and in other instances a different charge. Why is that?

A. Well, the offices that are owned by other optometrists, Texas State Optical offices, also known as associated offices, those men establish their own fee structure, their own examination fees, their own fees for glasses and contact lenses and other services.

Q. You do not establish the price at retail which these other men will charge?

A. No.

Q. So they vary from place to place and town to town and optometrist to optometrist?

A. Yes.

Q. But even with this individual variance that exists among TSO practitioners, are they more or less higher or lower or the same as the professionals in their community?

A. They are generally quite a bit lower.

Q. There is proof in this record, particularly, let us say, from Dr. Bowen and Dr. Sticksel with respect to the charges they assess the consuming public for soft contact lens. Do you at Texas State Optical dispense soft contact lens?

A. Yes.

Q. How many manufacturers or distributors of soft contacts are there?

A. There are only two that we can use to supply lenses to the public. They have to be approved by the Food and Drug Administration in Washington.

Q. What are the two?

A. Bausch & Lomb and Hydrocurve.

Q. Has the United States Food and Drug Administration approved both of the contact lens which you dispense?

A. Yes.

Q. Does any particular laboratory or any particular optometrist have anything to do with making up these lens, the soft contacts?

A. I am not sure I understand your question.

Q. How do you go about acquiring the soft contact lens?

A. We simply order them. The office orders them directly from the supplier, from either one of these two suppliers.

Q. Let us say it's a Bausch & Lomb lens that you are using and you decide a certain prescription is necessary. The optometrist merely orders the lens from the supplier?

A. That's right.

Q. There is no laboratory grinding or fabricating at all?

A. On the part of whom?

Q. On the part of anyone after the lens is ordered?

A. No.

Q. Whether you are a commercial or a professional optometrist, do you have the same two sources?

A. Yes.

Q. What is your charge for soft contact lens at this time in the state of Texas?

A. $225 or $230. I am not sure.

Q. Does that include the original examination?

A. It includes the original examination and any follow-up examinations for a period of, I believe, a year.

Q. Does that include all the materials and supplies that are dispensed with the soft contacts?

A. Yes. That is a kit that has to be dispensed with the soft contact lenses. It's a kit for boiling, for the purpose of sterilization of the lens.

Q. You stated earlier, but I would like to place it in capsule form. Did you personally apply for membership in the so-called TOA?

A. Yes.

Q. Were you approved?

A. No.

Q. Are you presently eligible in accordance with their Rules of Practice?

A. No.

Q. For what reason?

A. Because of the method, my mode of practice. I don't meet the requirements of the Rules of Practice of TOA.

Q. With respect to advertising, trade name and multiple offices?

A. And window displays, signs.

Q. In addition to optometrists, are there other licensed professionals who practice optometry?

A. Yes.

Q. Who?

A. There are M.D.'s, medical doctors, and D.O.'s, doctors of osteopathy, osteopathic physicians.

Q. Do they practice optometry as that term is defined by the Act?

A. Yes.

Q. Do they compete with you for patient care and ultimately for the patient's dollar?

A. Yes.

Q. Are they a viable competitive source within the eye care market within the state of Texas?

A. Yes.

Q. Have they been over the past five years?

A. Yes.

Q. Is there any reason to believe that this competitive force of the medical doctor will abate in the forthcoming years?

A. No. On the contrary, I would say.

Q. We have compared your fees to those of TOA members. How do your fees at TSO compare with those of the medical doctors?

A. The examination fees of the average medical doctor is anywhere from fifteen to twenty-five dollars, somewhere in that range.

Q. Again compared to what standard at TSO?

A. About ten dollars.

Q. Mr. Arnett from the Attorney General's office and Mr. Oliver prior to him touched on several matters leading to the adoption of the so-called 1969 Optometry Act. Have you personally participated

in and witnessed disputes within the optometric profession that have surfaced in the legislature through the years?

A. Yes.

Q. Have these disputes been represented again by the factionalism that you have discussed?

A. Yes.

Q. Does that factionalism sooner or later become an economic issue?

A. Yes.

Q. How and in what way does it become related to economics?

A. Well, because the big dispute between the two factions, which is strictly the question of mode of practice, has to do with competition in the market, competition in the field of opticianry and optometry and the efforts over the years by the TOA, the efforts have been to prohibit certain practices in the practice of optometry for the purpose of either eliminating or reducing the competition for the patients. So it ultimately boils down to one of economics between the two groups, one group trying to stifle the operations or limit the operations -- that is, the TOA group trying to limit the operations of the non-TOA or the corporation group.

Q. You have recited this in detail, and I am not going to rehash it, but what is the net effect to the patient or the consuming public from these efforts of TOA?

A. Well, the net effect primarily is increased costs to the public. That's the primary effect.

Q. How does the public end up having to sustain an increasing cost?

A. How did they --

Q. How does that come about?

A. By virtue of all these changes and restrictions placed upon the type of practice, the so-called commercial type of practice. It increases the cost of operating, and this cost is passed on to the public, to the patients.

Q. How does it innure to the benefit of the TOA members?

A. Well, as the competition is lessened or reduced, and as a result of that, lesser numbers will seek the services of the commercial optometrists, the result of that is some of those members of the public who might normally or would normally seek the services of the commercial optometrists and who do not as a result of the restrictions placed upon the commercial optometrists both in the form of their inability to obtain information as a result of restricted practices in advertising as well as increased costs that the commerical optometrists are faced with and have to pass on to the public. Some of the public will then be seeking the services of the non-commercial or the so-called professional optometrists, and it is a means of driving more and more people away from the commercial practitioner to the non-commercial practitioner.

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NOTATION

The Memorandum Opinion and Final Judgment of the Court below have been reproduced in the Appendix to the Jurisdictional Statement filed in 77-1163 at A-1 through A-17.